No. 658

In the Supreme Court of the United States

OCTOBER TERM, 1946

PACKARD MOTOR CAR COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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STATUTES

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OPINIONS BELOW

The opinions in the court below (R. III, 2096–2108, 2127–2128) are reported at 157 F. 2d 80. The findings of fact, conclusions of law and order of the Board (R. I, 30–39) and the intermediate report of the Board's trial examiner which the Board adopted by reference (R. I, 19–29) are reported at 64 N. L. R. B. 1212. The decision of the Board in a prior representation proceeding which forms a part of the record in this case (R. III, 1791–1834) is reported at 61 N. L. R. B. 4.

JURISDICTION

The judgment of the court below decreeing enforcement of the Board's order was entered on August 12, 1946 (R. III, 2095), and a petition for rehearing filed by the Company was denied by the court on September 30, 1946 (R. III, 2127). The petition for a writ of certiorari was filed on October 30, 1946, and was granted on December 9, 1946 (R. III, 2129). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and upon Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the Board could properly determine that the Company's general foremen, foremen, assistant foremen, and special assignment men are employees within the meaning of the National Labor Relations Act.

2. If the above question is answered in the affirmative, whether the Board could properly determine that the Company's general foremen, foremen, assistant foremen, and special assignment men may be included within some unit which would be appropriate for the purposes of collective bargaining under the Act.

3. If the preceding questions are answered in the affirmative, whether the Board's determination that the Company's general foremen, fore-

men, assistant foremen, and special assignment men constitute a single unit appropriate for the purposes of collective bargaining was a proper exercise of the Board's discretion.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in Appendix A, *infra*, pp. 115–122.

STATEMENT

1. THE BOARD'S FINDINGS IN THE REPRESENTATION PROCEEDING

Pursuant to a petition for investigation and certification of representatives filed by Foreman's Association of America, an unaffiliated labor organization established for the purpose of representing supervisory employees exclusively in collective bargaining, herein called "the Association" (R. II, 1299–1300), the Board conducted a hearing[1] and, on March 26, 1945, issued its Decision and Direction of Election (R. III, 1791–1821), in which it found (R. III, 1820) that "all general foremen, foremen, assistant foremen, and special assignment men employed by the petitioner Company at its plants in Detroit, Michi-

[1] Following the close of the hearing before its Trial Examiner, the Board, "in view of the importance of the question raised in the case" (R. III, 1792), heard oral argument on behalf of the Company, the petitioning union, and numerous other interested employer and employee groups (R. II, 1176–1298).

gan, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9 (b) of the Act," and that a question affecting commerce existed concerning the representation of these employees (R. III, 1796).

The subsidiary findings of the Board and the supporting evidence may be summarized as follows: [2]

(a) The Company's operations

The Company's manufacturing operations in Detroit are housed in 117 buildings, all but two of which are located on an 84-acre tract (R. III, 1796, 1814; II, 860, 791–793, 799). In these buildings there are approximately 32,000 rank and file employees (R. III, 1815; II, 798–799). Since 1937 these employees have been represented for the purpose of collective bargaining with the company by the United Automobile Workers of America, affiliated with the Congress of Industrial Organizations, hereinafter referred to as the UAW–CIO (R. III, 1800–1801; I, 403, II, 813, III, 1409–1420).

(b) The Company's supervisory hierarchy

To perform the work of supervising the productive operations of these rank and file employees, the Company employs approximately

[2] References preceding the semicolon are to the Board's decisions; succeeding references are to the supporting evidence.

125 general foremen, 643 foremen, 273 assistant foremen and 65 special assignment men (R. III, 1815; II, 801, I, 80, III, 1322). These more than 1100 employees, constituting the unit found appropriate by the Board, are in turn subject to the supervision and control of the Company's managerial hierarchy.[3]

The Company's manufacturing operations, headed by the Executive Vice President and Vice President of Engineering, are divided into two principal divisions, the Aircraft Engine Division and the Car and Marine Engine Division (R. III, 1814; II, 801, 807, 810–812, 942–943, 946–947).

[3] The chain of authority is fully charted in Company Exhibits 22, 22A–22J, 23A–23I (R. II, 802–807, III, 1479–1498). The chart set out below summarizes the information therein contained (R. III, 1814–1815):

Title	Number
President	1
Executive Vice President	1
Vice President of Engineering	1
Manager of Aircraft Engine Plant	1
Assistant Manager of Aircraft Engine Plant	1
Night Superintendent Aircraft Engine Plant	1
Asst. Superintendent Aircraft Engine Plant	1
Manager of Car and Marine Engine Plant	1
Executive Assistant Car and Marine Engine Plant	1
Managers of Divisions (Includes Master Mechanic—Plant Engineer—Chief Inspector)	16
Assistant Managers of Divisions (Includes Assistant Master Mechanic—Assistant Plant Engineer—Assistant Inspectors)	32
Superintendents of Divisions (Some Superintendents as shown by the Charts have the same jurisdiction as Managers or Assistant Managers)	20
General Foremen	125
Foremen	643
Assistant Foremen	273
Special Assignment Men	65

Each of these divisions is headed by a plant manager and an assistant plant manager (R. III, 1814–1815; II, 942–943). Subdivisions of these major divisions are headed by 16 managers, 32 assistant managers, and 20 superintendents (R. III, 1815; II, 943–945, 802–807, III, 1479–1498). The subdivisions, under the supervision of managers or superintendents, consist of a number of individual departments (R. 1815; II, 944–946).

(c) The duties and status of the Company's foremen

General foremen and subordinate foremen operate under the superintendents on the individual department level (R. III, 1815; I, 306, 331–332, 432, 499, II, 737–738, 802). While general foremen are in some cases in charge of a single department, in other instances they are in charge of as many as four departments (R. III, 1815; II, 802–803, III, 1484, I, 331–332, 432–435, 499). In such cases, a foreman or assistant foreman is usually in charge of each of the departments under the supervision of the general foreman (R. III, 1816; II, 802–807, III, 1479–1498, I, 448).[1] When the general foreman is in charge of a single department the foreman and assistant foremen under him either supervise the

[1] In some instances, a foreman is in charge of one or more departments under the direct supervision of a manager or superintendent. E. g., R. III, 1485 (Coon), 1492 (Endres), 1493 (Curtis).

work of specific segments of the department, such as subassembly lines, or act as his aides in connection with the work of the entire department (R. III, 1815–1816; I, 514, 287–288, 498, 587, 656–657, II, 802–807, III, 1479–1498). Some departments are headed by assistant foremen who report directly to the general foremen and perform the same function as do foremen in other departments (R. III, 1815; I, 287–288, 587, 606, II, 802–807, III, 1479–1498). Other departments are directly supervised by foremen without assistant foremen (R. III, 1815; I, 514, II, 802–807, III, 1479–1498). Special assignment men sometimes substitute for absent general foremen or foremen but their special role is that of "trouble-shooter" (R. III, 1815, 1817; I, 576–583, 635–638, 646). As such they investigate and unravel snarls in production lines wherever they develop, without regard to departmental boundaries (R. III, 1817; I, 577, 581, 635–638). On these occasions they exercise authority comparable to that of a general foreman or foreman (R. III, 1817; I, 515, 579, 581, 583, 645–646).

The foremen as a group are highly paid (R. III, 1816, 1817; II, 813, 843).[5] With the exception of a few assistant foremen who are paid on an hourly

[5] The company generally selects its assistant foremen from among the rank and file employees; its foremen from the ranks of assistant foremen; and its general foremen from the ranks of the foremen (R. I, 563–564, II, 812–813).

basis, the foremen are all paid a monthly salary based on a 40-hour week (R. III, 1816; II, 813–814, I, 373, 514, 515–516). All receive additional payment for overtime (R. III, 1816; II, 815–820). The salary range for general foremen is from $280 to $375 per month, for foremen from $220 to $370 per month, and for assistant foremen from $220 to $315 per month (R. III, 1816; II, 814). The salary of individual foremen within these ranges depends upon the type of work done in the department in which the foreman acts as supervisor. The foremen who supervise skilled employees are more highly paid than those who supervise semi-skilled workers (R. III, 1816; I, 421–422, 580–581, II, 814). The salary range for special assignment men is the same as the range for general foremen or foremen, and the rate they receive depends upon their skill and qualifications (R. III, 1816; I, 515, 579–580).

In other respects as well as the form and amount of wages, the foremen are treated by the Company as a group apart. Unlike ordinary employees, foremen are paid for justifiable absences and for holidays; they are not docked in pay for reporting to work late; they receive longer paid vacations, and are given severance pay upon release by the Company (R. III, 1817–1818; I, 516, II, 822–825, III, 1506–1510).

General foremen instruct and supervise the work of the foremen and assistant foremen under them, and are empowered to recommend changes in their terms and conditions of employment, such as rates of pay, transfer, lay-off, promotion, discharge or discipline (R. III, 1816, 1818; I, 301–302, 332–334, 517, 523–526, 564–565, 584–596, 610). Foremen sometimes exercise similar powers over assistant foremen (R. III, 1817; I, 517, 587, 593). The authority of the general foremen and foremen over the lower ranking supervisors is limited to the making of recommendations (R. III, 1818; I, 299–302, 333–334, 398, 523, 564). Final decision on all of these matters rests in the hands of higher ranking management representatives (R. III, 1818; I, 301–302, 333–334, 398, 564, 593–594, 605–606). This is true even with respect to the adoption of suggestions for improvement in methods of production. A general foreman is not empowered to put such suggestions from a foreman or assistant foreman into effect. He can only report them, together with his own recommendations, to the superintendent or division manager, who, in turn, must take the matter up with the planning, lay-out, or other staff department involved (R. III, 1818; I, 374, 605–606, II, 935, 937, 982, 1019–1024, 1143–1146).

For several years, the Company has conducted an in-service school for foremen which all ranks

of foremen attend (R. III, 1817, 1819; I, 374–383, 419, 512; II, 825–827). All grades of foremen attend the same classes and participate equally in the conference program (R. III, 1817, 1819; I, 374–383, 512, 517–518; II, 825–827). The subjects discussed cover a wide range including such matters as administration of the UAW-CIO contract, elimination of waste, and prevention of industrial accidents (R. III, 1817; I, 408, III, 1425–1428).

The duties and status of the company's foremen are typical of the duties and status of foremen in mass production industry generally (R. III, 1798–1802, 1816–1817; III, 1763, 1869–1878, 1900–1914). The foreman has no authority to make decisions or take action on such matters as the discharge, transfer, lay-off or reclassification of the employees under his supervision (R. III, 1801; I, 299–301, 319–320). The foremen are initially responsible for maintaining the quantity and quality of production achieved by the workers under their supervision at specified standards set by higher management (R. III, 1799, 1816; I, 299, 311, 331–332, 513–514, 603, II, 713–714). But the necessity of coordinating production among hundreds of departments requires that in performing this function the foremen be constantly subject to supervision and control, and that they adhere to detailed policies and for-

malized procedures prescribed from above (R. III, 1799; I, 301–302, 309–310, 506–507, 526–527, 535–539, 584–585, 588, 603, II, 737–738, 988). Thus, with respect to such matters as enforcing company rules, the foremen are provided with forms to fill out and with a detailed list of penalties to be applied in cases of specific types of violations (R. III, 1800, 1816–1817; I, 404, III, 1421–1422, I, 419–421, 535–539). The foremen must report in writing to their superiors any failure to achieve the requisite production and any steps taken to correct the cause of such failure (R. III, 1799, 1816–1817; I, 529–530, 541, 588–589, 622, II, 988). These reports, as well as recommendations for promotion, demotion, discipline, or transfer of rank and file employees, and employee passes of various kinds, are filled out by the foremen on routine forms supplied by higher management (R. III, 1799, 1801, 1817; I, 300–302, 319, 336–362, III, 1463–1474, I, 402–403, III, 1405–1408, I, 505–506, 528–529, II, 951).

Numerous service departments which exist for the purpose of maintaining production and correcting specific operating maladjustments further narrow the foremen's responsibility. Hiring of employees is done by the labor relations department as is the discharging and laying-off of employees; the lay-out of machinery, tools, and equipment is

the responsibility of the lay-out department; work is scheduled by the scheduling department; stock is moved between departments by the stock department; piece work rates are set by the time study department in conference with the UAW-CIO; the quality of items being produced is checked by the inspection department; and mechanical breakdowns are repaired by the maintenance department (R. III, 1799–1801; I, 299, 300, 311, 313, 530, 539–541, 562, 618-625, 626, 631–633, II, 715–716, 988–989).

The contract between the UAW-CIO and the Company, in the negotiation of which the foremen, of course, play no part, further canalizes the relations of the foremen with the rank and file employees (R. III, 1799–1801; I, 403, 510, III, 1409–1420). Not only does the contract define the penalties which a foreman may recommend in cases of violation of company rules, but the foreman's written recommendation itself is submitted to the UAW-CIO steward for approval before the penalty is imposed and the report forwarded to the labor relations department (R. III, 1800–1801; I, 299–302, 320–321, 322–323, 334–335, 341, 345, 404, III, 1421–1422, I, 533–535, 508–509). If the steward refuses to approve the foreman's recommendation the accused employee is given a hearing before a committee composed of UAW-CIO and management representatives (R. III, 1801; I, 299, 320, 338–339,

II, 986). The contract further provides a grievance procedure whereby employee grievances, except those involving "company policy," are submitted by the UAW-CIO's departmental stewards to the foremen and if possible settled between them (R. III, 1801; I, 323, 403, III, 1410–1411). Grievances involving "company policy," however, are not referred to the foremen; they are referred directly by the UAW-CIO's district steward to designated officials in the company's labor relations department (R. III, 1801; I, 323, 403, 404–406, III, 1410, 1423).

In sum, the foremen in this plant, typical of modern mass production industry, no longer even resemble the foremen of the early 1900's who were masters in their own departments and who exercised plenary authority over their subordinates (R. III, 1798; 1899–1916, I, 648, 659, 661, II, 682, 685–688, III, 1763, 1900–1913).

(*d*) *Organization of the Foreman's Association of America*

Spurred by resentment over their loss of prestige and authority, and by the growing realization of their own job insecurity and individual weakness in dealing with management, particularly when contrasted with the bargaining power wielded by the rank and file through their labor organizations, foremen determined to enhance their bargaining

position through collective action (R. III, 1802–1803).[6]

Early in 1942, a group of foremen employed at the River Rouge plants of the Ford Motor Company met and organized the first chapter of the Foreman's Association of America (R. III, 1803; 1763,

[6] Several of the Company's foremen testified concerning their reasons for joining the Association and the objectives they hoped to secure through collective bargaining. Paramount among the reasons advanced were the desire to obtain representation and an effective voice in dealing with management concerning grievances, ability to resist arbitrary action by management in such matters as classification, layoff, and demotion, and opportunity to participate in the formulation of the rules under which they work (R. I, 290–291, 443, 456–457, 459, 508–509, 547, 664–667, 671, II, 696–701, 822, 842). Illustrative of the conditions which obtain absent collective bargaining is the fact that when any of the company's foremen are called before management to face charges of misconduct, they are not permitted to have a representative present (R. II, 1016–1018); foremen are not consulted in the formulation of the shop rules which govern their conduct as well as that of the rank and file, although representatives of the rank and file participate equally with management in the formulation of those rules (R. II, 1015–1016); and foremen are not consulted in the formulation of the rules governing the terms of their employment, such as overtime and vacation pay (R. I, 291–292, II, 821–822). The panel appointed by the National War Labor Board on May 31, 1944 (R. III, 1885), to consider the grievances of foremen, which had provoked numerous work stoppages detrimental to the war effort, commented as follows with respect to the adequacy of existing grievance procedures available to foremen (*The Foreman's Cases*, 26 War Lab. Rep. 644, III, 2068–2069):

"The Panel considers procedures for settling grievances individually through ordinary channels of authority to be

1878–1886, I, 61–77). The Association, formed for the purpose of representing foremen in collective bargaining, grew rapidly and spontaneously, first among foremen in the Detroit area, and later among

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inadequate. The insistence by management that its representatives will deal with each foreman only individually and then only about his own grievances impedes, if it does not preclude, the initiation of grievance cases affecting groups of foremen. But even in his own behalf a single foreman may be at a disadvantage in presenting his case. Being one among many, the foreman is individually dispensable and replaceable. He is too far down the management ladder to influence policy or to argue effectively against superiors. He is at a disadvantage in questioning the decisions, rules, and policies of his superiors. Too often, he is in the position of requesting a superior to reverse a decision which the superior himself has made and which the superior may be reluctant to change. Alternatively the foreman may be in the position of requesting his superior to press his case for changes in the decisions, rules, or policies determined higher up in management. Such a superior would naturally be hesitant in pressing the case of a subordinate before reluctant higher officials, especially if doing so were to imperil his own position. If the foreman appeals his own case over the head of his immediate superior, he runs the risk of jeopardizing his relations with the man under whom he must work. The numerous steps through which the individual must appeal a grievance for final adjudication are in some cases sufficient to exhaust the perseverance of the foreman and to compromise his standing in the company."

It is significant to note, in connection with the recommendations of this panel, that the resolution pursuant to which it was created precluded the panel from considering the question whether supervisory employees should be granted collective bargaining rights, that question being deemed subject to the exclusive jurisdiction of the National Labor Relations Board (R. III, 1763, 1855, 2075).

foremen employed in many major industries throughout the United States and Canada (R. III, 1803; 1390, I, 77–106).[7]

These efforts to achieve collective bargaining, however, were generally resisted by employers (R. III, 1803).[8] The refusal by employers to recognize and bargain collectively with the Association on behalf of the foremen provoked many foremen, including those employed by the company, to strike for recognition (R. III, 1803–1804; I, 55–58, II,

[7] Foremen employed by the Company were among the first to organize a chapter of the Foreman's Association. The Packard chapter was chartered on October 18, 1942 (R. III, 1382, 1884). In a consent election conducted by the Board among the Company's foremen on February 23, 1943, prior to the Board's decision in *Matter of Maryland Drydock Co.*, 49 N. L.R. B. 733, decided May 11, 1943, 486 foremen voted for representation by the Association and only two against (R. II, 1308–1315).

The record shows that these foremen have persisted in their adherence to the Association throughout the intervening period despite the company's refusal to recognize or bargain with it. In support of its petition for certification in the instant case, the Association submitted evidence that 84 out of 125 general foremen, 444 out of 643 foremen, 184 out of 273 assistant foremen and 27 out of 65 special assignment men employed by the Company on December 2, 1944, were dues paying members of the Association (R. III, 1795; 1321–1322).

[8] As of the date of the hearing in the instant case the Association had been able to secure only two contracts, one with the Ford Motor Company and the other with the United Stove Company (R. III, 1803; 1323–1344, 1391–1395, 1883). Since that date the Association has succeeded in securing one additional contract, that with General Ceramics & Seatite Corp., reprinted in *Union-Shop Agreement Covering Supervisors*, 18 L. R. R. 103–108.

1315–1320, III, 1763, 1866, 2075). These strikes, which occurred between July 1, 1943 and November 1944, severely disrupted both war production and interstate commerce (R. III, 1803–1804).[6]

(e) *The Board's conclusions*

On the basis of the foregoing facts, the Board concluded that the classes of foremen on whose behalf the Association's petition was filed were "employees" within the meaning of Section 2 (3) of the National Labor Relations Act (R. III, 1795). The Board rejected (R. III, 1794–1795) the Company's argument that supervisory employees allegedly had not engaged in strikes to obtain collective bargaining rights prior to the passage of the Act and that Congress intended the Act to apply

[6] The Board found (R. III, 1803–1804), on the basis of statistics prepared by the Department of Labor and introduced in evidence at the hearing in the representation proceeding (Bd. Exh. 20, I, 55–58, II, 1315–1320), that "* * * after the decision in the *Maryland Drydock* case and from July 1, 1943, through November 1944, there were 20 strikes of supervisory employees; 131,000 employees were involved and 669,136 man-days of work were lost as a result. Over 96 percent of the man-days lost occurred in strikes for recognition. The basic industries of the nation were affected: shipbuilding, steel, aluminum, brass, automobile, coal mining, airplane products, railroad cars, and public utilities. The effect of these strikes for recognition on the production of vital war material has been serious." The Board also noted (R. III, 1804; 1449–1450) that "General Arnold, Commanding General of the Army Air Forces, testifying before the National War Labor Board in the case of the Foreman's Association of America on May 17, 1944, singled out the foremen's strikes as causing 'one of the most serious setbacks' that the Army Air Force program has had since its inception."

only to those classes of employees which had done so. The Board pointed out that organizations of supervisory employees formed for the purpose of engaging in collective bargaining antedate the Act by many years, and that at the time the Act was adopted collective bargaining on behalf of supervisory employees was a common practice in the printing, building, and metal trades, and in the maritime and railroad industries (R. III, 1794; III, 1763, 1916–1924).[10] The Board then found

[10] Documents introduced in evidence in the instant case reveal that in a number of trades and industries self organization and collective bargaining by supervisory employees had been well established long before the Act was passed. The organizational patterns included unions to which only supervisors were eligible as well as unions which represented both supervisory and rank and file employees in the same unit. Thus, the National Marine Engineers Beneficial Association now affiliated with the C. I. O., one of three maritime unions admitting only supervisory employees to membership, had been in operation since 1875; the International Typographical Union has required foremen to be members of the same locals as the rank-and-file employees under their supervision since 1889. Seven unions exclusively for supervisory employees were in existence before 1922. In addition, 29 national unions in the printing, building, and metal trades, and in the maritime and railroad industries either require or permit supervisory employees to be members of rank-and-file unions. Pet. Ex. 46, U. S. Bureau of Labor Statistics, Bull. No. 745, *Union Membership and Collective Bargaining by Foremen* (1942), pp. 1–5, 6–7; R. III, 1763, 1919–1924. See also *The Unionization of Foremen*, Research Report No. 6, American Management Association, New York, N. Y. (1945); Peterson, Florence, *American Labor Unions* (1945), pp. 90–97; Northrup, Herbert R., *The Foreman's Association of America*, Harvard Business Review, Vol. 23 (Winter, 1945), p. 187.

(R. III, 1794) that the Company's proffered "static touchstone" of jurisdiction, i. e., whether the employees' organizational activities antedated the Act, was unduly restrictive of the rights of "vast sections of employees in many vital industries," and was wholly incompatible with the broad purposes of Congress and with the guiding principles of construction of the statute approved by this Court. Applying those applicable principles, the Board found that the relation between the Company and its supervisory employees was that of employer and employee, and that the conditions of that relation required that the supervisory employees, under the premises of the Act, be accorded the benefit of its protection (R. III, 1795).

Apart from its contention that the supervisors here involved are not "employees" within the meaning of the Act, the Company contended further that no collective bargaining unit containing these supervisors could be found "appropriate" because, allegedly, collective bargaining by supervisors would not "effectuate the policies of this Act" (Section 9 (b)) (R. III, 1805–1806). The Company's primary argument, that the establishment of bargaining units for supervisory employees under the Act would divide the loyalty of supervisors between their employers and the Union, and would therefore react detrimentally upon established production techniques and upon the interests of management, was rejected by the Board (R. III, 1810–1812).

Such an assumption, the Board found (R. III, 1811), "is not only repugnant to the basic democratic philosophy upon which this Act is founded, but it has never proved valid in our experience under the Act." Drawing upon that experience, the Board noted that in the early days of administration of the Act similar fears had been expressed by employers concerning the fidelity of rank and file employees and that employers, including this very Company,[11] had objected for the very same reason to collective bargaining by plant guards (R. III, 1811; II, 1205–1206). In both instances, as the Board noted (R. III, 1811), these fears proved groundless.[12] The Board observed that the duty of loyalty owed by foremen to their employer extends only to the performance of duties by the foremen on behalf of their employer; that it does not restrict the foremen in bargaining on their own behalf with their employers for the best obtainable terms and conditions of employment for themselves (R. III, 1811–1812; I, 32–33, II, 753). The Board further took cognizance of the fact that many of the foremen here involved joined the Association more than two years before the hearing in the instant case and their loyalty to the Association arising from their membership therein has admittedly not detracted from their efficiency or loyalty to the Company in

[11] *Matter of Packard Motor Car Co.*, 47 N. L. R. B. 932, 933.

[12] The Company admitted at the hearing that its plant guards who have bargained collectively with it for several years have not grown any the less faithful or efficient in the performance of their duties (R. II, 1063–1065, 1205–1206).

the performance of their work (R. III, 1811; II, 1044, 1064–1066, 1081–1084, 1212–1213).

As the second ground for rejecting the "divided loyalty" argument, the Board noted that, in joining the Association for the purpose of engaging in collective bargaining, the foremen exercised a right which is theirs quite apart from the Act (R. III, 1816); that the Board is not empowered either to disband that organization or to prohibit the foremen from exercising their economic power to compel the Company to deal with them collectively rather than individually. Therefore the Board concluded that if it were to deny to the foremen access to the administrative machinery of the Act, it would invite the very causes of disruption of interstate commerce which the Act was designed to avoid.

Having thus decided to proceed with consideration of the Association's petition, the Board turned to the question of the type of unit which would be most appropriate to insure to the supervisory employees here involved the full benefit of their right to self organization and collective bargaining and best effectuate the policies of the Act. The Board concluded that for these purposes, a single unit comprising all four grades of foremen should be established (R. III, 1814–1820). In reaching this conclusion the Board considered the strong community of economic interest of all four classes of foremen, the similarity of their duties, functions and responsibilities, and the fact that in many re-

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spects their employer treats them as a single group; for example, all but a few are paid on a salary basis, all receive time and a half for overtime, all attend the same classes at the foremen's school, and all receive similar privileges and advantages which are not extended to rank and file employees (R. III, 1818–1819).

The Board considered the fact that some classes of foremen exercise a degree of supervision over other classes, a fact which the company urged should induce the Board to segregate each class of foremen into a separate unit, and found that this, of itself, was not sufficient to outweigh the factors which dictate grouping all four classes of foremen together for collective bargaining purposes (R. III, 1818).

(f) The Board's certification of the Association

Upon these findings the Board, one member dissenting, directed, pursuant to Section 9(c) of the Act, that an election be conducted among the foremen comprising the appropriate unit to determine whether or not they wished to be represented by the Association, the only labor organization claiming to represent them (R. III, 1820–1821, 1822–1834). In the election, held on April 17, 1945, the Association received 666 votes out of a total of 1,101 valid votes cast (R. III, 1758–1759, 1835–1836). Thereupon, on April 28, 1945, the Board certified the Association as the exclusive bargaining representative of the employees in the appropriate unit (R. III, 1758–1759, 1836–1837).

2. THE UNFAIR LABOR PRACTICE PROCEEDING

On May 18, 1945, the Company, refusing to recognize the certification, rejected the Association's request for a bargaining conference (R. I, 25; III, 1760–1761, 1841–1842, 1846–1850). The Association thereupon initiated proceedings under Section 10 of the Act, by filing charges that the Company had refused to bargain with it as the exclusive representative of the employees in the appropriate unit (R. I, 19; III, 1754, 1780–1781). In its answer to the Board's complaint and at the hearing in these proceedings, the Company admitted its refusal to bargain, but reiterated its contentions presented to the Board in the prior representation proceedings that the foremen involved are not "employees" within the meaning of the Act, and that they do not constitute a unit appropriate for the purposes of collecive bargaining (R. I, 20–21; III, 1754, 1756–1757, 1782–1785, 1787–1790, 2083–2085).

In its decision issued on December 6, 1945 (R. I, 31), the Board rejected these contentions,[12] affirmed its finding that the foremen constitute an appro-

[12] The Board adopted, without restatement, the findings and conclusions of the Trial Examiner who conducted the hearing (R. I, 30–31, 19–28). Board Chairman Herzog, however, who succeeded Chairman Millis shortly after the Board's decision in the representation case was issued, filed a special concurring opinion in which he voiced his agreement with the conclusions reached by the Board in that decision (R. I, 32–37). Board Member Reilly dissented because he inferred from the evidence as a whole that the Association was not a truly independent labor organization (R. I, 37–38).

priate unit for collective bargaining and found that the Company's admitted refusal to bargain with the Association as statutory representative constituted a violation of Section 8 (1) and (5) of the Act (R. I, 23–26). The Board ordered the Company to cease and desist from the unfair labor practices found, to bargain collectively with the Association upon request, and to post appropriate notices (R. I, 30–31).

3. THE ENFORCEMENT PROCEEDING

On December 18, 1945, the Board filed a petition in the court below to enforce the Board's order (R. I, 1–4). On August 12, 1946 the court entered its opinion enforcing the Board's order (R. III, 2096–2106, 2107–2108), one judge dissenting. The court rejected the Company's contention that because supervisors were "employers" within the meaning of Section 2 (2) of the Act, they could not be deemed "employees" within the meaning of Section 2 (3) (R. III, 2102–2105).[14] The court sustained the Board's conclusion that supervisors, in their relations with those who employ them, are "employees" within the meaning and purposes of Section 2 (3) of the Act (R. III, 2104–2105); that, as such, they possess the rights conferred upon employees in Section 7, including the right to bar-

[14] Judge Simons dissented on the ground that supervisors in their relations with their subordinates are "employers" within the broad definition contained in Section 2 (2) and that "the breadth of [that Section] necessarily limits the ambit" of the definition of "employee" contained in Section 2 (3) so as to exclude all who fall within the definition of

gain collectively in an appropriate unit (R. III, 2102); and that the unit established by the Board, comprising four grades of supervisors, is appropriate (R. III, 2105–2106). The court further sustained the Board's findings that the Association "is independent and neither a part of nor controlled by the union representing the production workers;" that representation of the supervisors by the Association "leaves the foremen uncontrolled agents in dealing with the rank and file;" and that "no reason appears to anticipate that the independence of the Foreman's Association of America will in the immediate future be destroyed" (III, R. 2106).

SUMMARY OF ARGUMENT

I

Foremen, who are employees in layman's parlance and at common law, are likewise employees under the broad definition of that term contained in the National Labor Relations Act. The Congressional purpose of equalizing bargaining power be-

"employer" from the category of "employee" (R. III, 2107–2108). In his dissent from the court's denial of the Company's petition for rehearing, Judge Simons drew further support for his conclusion from expressions by proponents of the bill which became the National Labor Relations Act indicating that their "dominant purpose" was to protect "laborers," "workers" and "production men"; and from the alleged fact that "supervisory employees were not identified with the labor movement" prior to enactment of the National Labor Relations Act and for a substantial period thereafter (R. III, 2127).

tween employees and employers applies equally to foremen in their relation with their employers as to rank and file employees. Recognition that foremen are "employees" within the meaning of Section 2 (3) of the Act is not precluded by the fact that they may also, under certain circumstances, be held to be "employers" or by the fact that employers are held responsible when foremen, who are vested with economic power over subordinates, use that power to thwart the organizational freedom of rank and file employees. Self-organization and collective bargaining by foremen are not *per se* destructive of the rights of rank and file employees; to the extent that there is no conflict between the exercise of rights by both groups the Board is duty bound to protect the rights of both. Where conflict arises between organizational activity by supervisors and rank and file freedom, the Board assesses the extent of the clash between them and applies such limitations upon supervisory activity as are necessary to preserve the paramount interests of the rank and file employees.

The Board and every court which has considered the question have held that foremen are employees under the Act and that, subject to the above limitation, they are entitled to the Act's protection in their efforts to organize and bargain collectively. That protection is as necessary for foremen as for rank and file employees, since, under individual bargaining, foremen have no greater bargaining power in dealing with their employers than do non-

supervisory employees. The evils which Congress sought to remedy in the Act are as much present in the foreman-employer relation as in the ordinary employee-employer relation.

Neither prior legislation nor contemporaneous comment by sponsors of the Act affords any indication that Congress intended to exclude foremen from the benefits of the Act, which, in terms, applies to them as to all other employees. Supervisory employees had engaged in collective bargaining long before the Act was passed and had been protected in their organizational rights by administrative agencies established by Congress in the days prior to enactment of the National Labor Relations Act. In view of these facts, the failure to exempt supervisors from the definition of "employee" is persuasive evidence that Congress intended to continue to grant them the same protection as other employees.

Neither self-organization for purposes of collective bargaining by foremen nor statutory protection of their right to do so tends to jeopardize legitimate employer interests in faithful performance of duty. The Board and the courts have recognized the fallacy in the argument that self-organization by employees for the purpose of advancing their own economic interests destroys the will or the power of employees to perform their duties properly on behalf of their employers. The argument is no more valid when applied to foremen than when applied to plant guards, editorial writers, confidential employees or ordinary rank and file employees upon

whose honesty and faithfulness employers must depend in the conduct of their business. In any event, denial of statutory protection would not obviate the dangers which the Company envisions, for it would still be lawful for foremen to organize. On the other hand, statutory protection of the self-organizational rights of foremen is not incompatible with protection of legitimate employer interests. Employers retain their power to punish by discipline or discharge for breach of duty arising from any cause. Labor organizations uniformly recognize the legitimacy of employer demands for faithful performance and provide safeguards in collective agreements against breaches stemming from improper union pressure. The history of supervisors in the trade union movement, and the available evidence concerning self-organization and collective bargaining by plant guards, establish that the Company's fears concerning the future faithlessness of its supervisors are without foundation. Finally, protection of the bargaining rights of foremen eliminates a potent source of interruption of commerce arising from strikes for recognition, the very type of strikes Congress sought to make unnecessary by the passage of the Act.

II

The Board had no power to hold that foremen, though employees, could not be included within some unit appropriate for purposes of collective bargaining. Such a holding would, in effect, read

Section 8 (5) out of the Act insofar as foremen are concerned. Section 9 (b), which authorizes the Board to classify employees into one of the stated types of bargaining units in a manner which will "insure to employees the full benefit of their right to self-organization and to collective bargaining and otherwise to effectuate the policies of this Act," does not empower the Board to exclude employees from all bargaining units. Nor is the Board empowered to "select bargaining agents" for employees. The statute expressly confers full freedom of choice of representatives upon the employees themselves. Unless the selection of a particular representative is violative of Section 8 (1) or (2) of the Act, or otherwise tends to infringe the statutory rights of other employees, the Board is therefore powerless to make extension of the benefits of the Act to supervisors turn upon the character or affiliation of the labor organization which supervisors select to represent them. Cf. *Hill* v. *Florida*, 325 U. S. 538.

III

The Board's finding that the four classes of foremen involved constitute a single appropriate bargaining unit follows well established principles and clearly comports with the standards provided by Congress for the Board's guidance. The similarity of duties of all grades of foremen which often results in interchange of positions and variations in obligation among particular classifications, the sim-

ilarity in privileges which distinguish them from both top management and rank and file employees, their common problems and status in bargaining with the Company, and the fact that they have organized as a single group, all lend overwhelming support to the Board's conclusion.

ARGUMENT

INTRODUCTION

Several issues left open by the Board in its decision in the instant case have been decided by the Board in subsequent cases. Since these decisions represent the Board's judgment on questions of importance in the construction of the statute and since they bear directly upon issues presented in this case, and referred to by the court below, it is necessary to summarize them briefly here. We shall point out below the respects in which they affect the issues in this Court.

In *Matter of L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298, decided January 8, 1946, the Board held that it had no power to deprive supervisory employees of statutory bargaining rights by holding that they could not constitute a unit appropriate for purposes of collective bargaining within the meaning of Section 9 (b) of the Act. Section 9 (b), it concluded, conferred upon the Board power to classify employees and to segregate them into separate units for the purpose of effectuating the policies of the Act, but not to exclude employees from all units. The court below apparently adopted this view (R. III, 2102).

In *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, decided March 7, 1946, and 71 N. L. R. B., No. 203, decided December 30, 1946, the Board held that in view of the express policy of the Act to insure to employees "full freedom" in their choice of representatives it would be an abuse of the Board's administrative discretion to make the exercise of its powers under Section 9 of the Act depend on whether or not the representative selected by an appropriate unit of supervisory employees was affiliated with, or independent of, unions representing rank and file employees. The court below indicated disagreement with this construction of the Act (R. III, 2106). In its earlier opinion in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 146 F. 2d 718, judgment vacated and case remanded for further consideration, 325 U. S. 838, the court below held that the language of Section 9 (b), which provides that the Board shall decide in each case which of the specified types of bargaining unit is appropriate "to effectuate the policies of this Act" empowers the Board to "select bargaining agents" for employees (146 F. 2d at 720–721, 722). Pursuant to this theory of the Board's powers, the court there held that the Board erred in finding appropriate a unit of militarized plant guards which selected as their bargaining representative a labor organization which also represented the employer's production employees (146 F. 2d at 722–723). The court adhered to this view

in its opinion on remand (154 F. 2d 932, 934-935).[15] In its opinion in the instant case the court below reiterated this view of the Board's powers under the Act. It therefore felt constrained to pass upon "the propriety of the exclusive bargaining representative named by the Board" (R. III, 2106). It upheld the Board's certification only because "the union involved is independent and neither a part of nor controlled by the union representing the production workers" and therefore, "This is a situation diametrically opposite to that presented in *Jones and Laughlin Steel Corporation* v. *National Labor Relations Board, supra*, where the bargaining agent designated was the identical union which represented the production workers" (*ibid.*).

I

THE BOARD COULD PROPERLY DETERMINE THAT THE FOREMEN EMPLOYED BY THE COMPANY ARE "EMPLOYEES" WITHIN THE MEANING OF THE ACT

A. *The issue presented*

Section 2 (3) of the Act reads as follows:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any

[15] This Court, on December 23, 1946, granted the Board's petition for a Writ of Certiorari in this case, No. 418, this Term.

> unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

It is the Company's position that, despite the sweeping inclusion in this definition of "any employee," with only specifically enumerated exceptions, an additional exception for supervisory employees should be read into the Act.

At the outset, it is necessary to point out an important limitation on the issue thus raised. This case does not present for determination by the Board or by the Court any issue concerning the legality of self-organization or concerted action by foremen for the purposes of collective bargaining. Here, unlike numerous other cases which have come before the Board and the courts,[16] the issue of cover-

[16] See e. g., *N. L. R. B.* v. *Hearst Publications*, 322 U. S. 111; *N. L. R. B.* v. *R. A. Blount*, 131 F. 2d 585 (C. C. A. 8), certiorari denied, 318 U. S. 791; *Matter of Park Floral Co.*, 19 N. L. R. B. 403; *Matter of Jalmar Berg*, 35 N. L. R. B. 357; *Matter of Federal Ice & Cold Storage Co.*, 18 N. L. R. B. 161, 164–165. And cf., the typical questions presented with respect to other Acts of Congress. *United States* v. *Silk*, No. 312, this Term. (Social Security Act); *Harrison* v. *Greyvan Lines, Inc.*, No. 673, this Term (Social Security Act); *Rutherford Food Corporation* v. *Walling*, No. 652, this Term (Fair Labor Standards Act); *United States* v. *Vogue, Inc.*, 145 F. 2d 609 (C. C. A. 4) (Social Security Act); *Grace* v. *Magruder*, 148 F. 2d 679 (App. D. C.) (Social Security Act); *Magruder* v. *Yellow Cab Co.*, 141 F. 2d 324 (C. C. A. 4) (Social Security Act); *Walling* v. *American Needlecraft*, 137 F. 2d 60 (C. C. A. 6) (Fair Labor Standards Act).

age does not turn on whether the persons involved are, on the one hand, "employees" who, ever since the demise of the "conspiracy doctrine", have enjoyed the "fundamental right" (*National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 33) to organize and bargain collectively concerning the terms and conditions of their employment, or, on the other hand, independent enterprisers whose self-organizational activities are subjected by law to limitations on restraints of trade.[17] The Company does not challenge the fact that, apart from the National Labor Relations Act, foremen are "employees" both in layman's parlance and in law. Thus, both federal and state courts have recognized that foremen are "employees entitled to the protection of employer's liability[18] and workmen's compensation

[17] Compare, *Milk Wagon Drivers Union* v. *Lake Valley Co.*, 311 U. S. 91, *New Negro Alliance* v. *Grocery Co.*, 303 U. S. 552, and *Bakery & Pastry Drivers* v. *Wohl*, 315 U. S. 769, with *Columbia River Packers Ass'n* v. *Hinton*, 315 U. S. 143, and *American Medical Ass'n* v. *United States*, 317 U. S. 519.

[18] Prior to the abolition of common-law defenses in the Federal Employer's Liability Act, 53 Stat. 1404, 45 U. S. C. 51, and similar state statutes, it was the employers who contended that foremen were "employees," and hence "fellow servants" of the employees under them, so that the employers would be relieved from liability for the negligence of the foremen which resulted in injuries to members of their crews. In reply to this contention, it was never even argued that the foremen were not "employees" but only that, as respects the employees under them, the foremen were in the position of "vice principals" or representatives of their employers. The courts were not hospitable even to that contention. In *North-*

statutes,[19] despite the fact that foremen exercise authority over subordinate employees.

Nor does the Company assert that the activities of foremen in forming unions and in striking for the purpose of compelling employers to bargain col-

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ern Pacific R. Co. v. *Peterson*, 162 U. S. 346, 357, this Court said of a gang foreman who had complete authority to hire and fire, "He was in fact, as well as in law a fellow-workman * * *. The mere fact * * * that he did not actually handle a shovel or a pick, is an unimportant matter. Where more than one man is engaged in doing any particular work, it becomes almost a necessity that one should be boss and the other subordinate, but both are nevertheless fellow-workmen." And in *Alaska Mining Co.* v. *Whelan*, 168 U. S. 86, 89, the Court pointed out that whether the foreman "had or had not authority to engage or discharge the men under him is immaterial. Even if he had such authority, he was nonetheless a fellow-servant with them, employed in the same department of business, and under a common head."

The Federal Employer's Liability Act defines employees entitled to its benefits as "any employee of a carrier." This definition, identical in terms with the definition contained in Section 2 (3) of the National Labor Relations Act, has been applied without challenge to foremen. *Owens* v. *Union Pacific R. Co.*, 319 U. S. 715.

[19] State courts have uniformly held that the term "employee," used in Workmen's Compensation statutes, unless expressly restricted, applies to foremen and even to superintendents. See, e. g., *Bidwell Coal Co.* v. *Davidson*, 187 Iowa 809, 174 N. W. 592; *Harrelson* v. *State Ind. Comm.*, 92 Okla. 121, 218 Pac. 685; *Aken* v. *Barnet & Aufsesser Knitting Co.*, 118 App. Div. 463, 103 N. Y. S. 1078; *In re Rheinwald*, 168 App. Div. 425, 153 N. Y. Supp. 598; *Cashman's* case, 230 Mass. 600, 120 N. E. 78; *Dewey* v. *Dewey Fuel Co.*, 210 Mich. 370, 178 N. W. 36 (Mich.); *Adam Black & Sons* v. *Court of Common Pleas*, 8 N. J. Misc. 442, 150 Atl. 672; *Eagleson* v. *Preston Co.*, 265 Pa. 397, 109 Atl. 154; *Goldin* v. *Goldin Decorating Co.*, 247 N. Y. 603, 161 N. E. 99.

lectively with them are in any sense illegal.[20] The issue here presented is therefore a narrow one, i. e., whether the Board exceeded its authority in interpreting the statute, which is designed to minimize interruptions to commerce provoked by the refusal of employers to recognize and bargain collectively with representatives lawfully chosen by their employees, as not excepting from its scope such provocations to dispute as would inhere in an employer's refusal to recognize and bargain collectively with representatives lawfully selected by employees who are engaged as foremen. A contrary interpretation, as the Board pointed out (R. III, 1805, 1810, 1813–1814), would mean that foremen who have lawfully organized for purposes of collective bargaining, like non-supervisory employees who had organized for that purpose in the days prior to the National Labor Relations Act, would be compelled to resort to a trial of economic strength to compel recognition

[20] In the oral argument before the Board, the company's counsel in reply to a question by Board Member Houston, stated: "The foremen have a right to organize. We do not deny that." (R. II 1194). The proponents of the Case Bill (H. R. 4908, 79th Cong., 2d sess.), who deemed it inadvisable to afford statutory protection to organization and collective bargaining by foremen, did not seek to make such conduct illegal. Thus, although Section 9 (a) of the Bill as passed (Print of May 25, 1946) undertook to amend the definition of "employee" in Section 2 (3) of the National Labor Relations Act by excluding supervisors, Section 9 (c) of that Bill contained the explicit reservation that "nothing herein shall prohibit a supervisory employee from becoming or remaining a member of a labor organization."

from recalcitrant employers. The Board properly concluded, we submit, that nothing in the Act or in its legislative history requires that the large and growing body of industrial disputes which stem from employer refusals to bargain collectively with representatives freely chosen by foremen must continue to take their toll of interstate commerce rather than be resolved peacefully through the administrative machinery created by Congress for the purpose of dealing with questions concerning representation. The broad purposes of the statute, as well as its unambiguous language, militate against the imputation to Congress of any such intention.

B. *The scope of the term "employee" must be determined in the light of the purposes of the Act*

In its statement of "Findings and Policy" contained in Section I of the Act, Congress set forth, in explicit terms, the premises upon which the statute is predicated, and the objectives to be achieved through its enforcement. In the first paragraph of that Section, Congress found that "The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have * * * the necessary effect of burdening or obstructing commerce." In the second paragraph, it found that "The inequality of bargaining power between employers who do not possess full freedom of associa-

tion or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce." In the third paragraph, it found that "* * * protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions and by restoring equality of bargaining power between employers and employees." In the fourth paragraph, Congress therefore declared it to be the policy of the United States "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions where they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

To implement this policy, Congress, in Section 7 of the Act, confirmed the existence of the right of "employees * * * to self-organization, to form,

join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." In Section 8 of the Act, Congress sought further to protect those rights by imposing upon employers the duty to refrain from interfering with their free exercise, and to bargain collectively with representatives selected by employees in the exercise of those rights.

Devising these guarantees as the expedient best calculated to attain the statutory objectives, Congress sought to extend them "so far as its power could reach." *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 125. To assure that the statute would not be read "through the distorting lenses of inapplicable legal doctrine" (*Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 144), Congress swept aside technical legal distinctions and in Section 2 (3) of the Act asserted, "The term 'employee' shall include *any employee,* and shall not be limited to the employees of a particular employer. * * *" [Italics added.] In so doing, it rejected common-law limitations on the concept of "employee" (*National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 120, 126–130), and *a fortiori,* could not have intended to exclude from the benefits of the Act persons who, like foremen, clearly meet "the tests of the more or less established concept of

'the legal relationship of employer and employee,' *Texas Co.* v. *Higgins*, 2 Cir., 1941, 118 F. 2d 636, 637" (*Deecy Products Co.* v. *Welch*, 124 F. 2d 592, 598 (C. C. A. 1)). Congress intended to expand, not contract, the "more or less established" category of "employee." In *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 129, this Court pointed out that the term "employee", "like other provisions, must be understood with reference to the purpose of the Act and the facts involved in the economic relationship. 'Where all the conditions of the relation require protection', protection ought to be given."

C. *The Board's conclusion that foremen are "employees" is supported by the terms of the Act and the facts of the economic relationship*

The purpose of the broad definition of "employee" was to insure that the benefits of the Act would be given the widest possible application. The only persons excluded are those employed as agricultural laborers, persons in domestic service, and those employed by their parent or spouse. These exceptions were not made because the theories of collective bargaining were inapplicable to such persons, but purely "for administrative reasons." S. Rep. No. 573, 74th Cong., 1st Sess., p. 7. "Nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master." *National Labor*

Relations Board v. *Skinner & Kennedy*, 113 F. 2d 667, 671 (C. C. A. 8).

The Company's challenge to the Board's finding that the foremen are "employees" is not predicated upon any assertion that the finding is based upon an improper appraisal of "the facts involved in the economic relationship" between the foremen and the Company. Indeed, since it is undisputed that the Company hires the foremen and discharges them, fixes the rate and pays their compensation, and exercises complete control over the manner in which they perform their work, no such assertion could possibly be made. We know of no case in which persons whose working conditions are so completely controlled by another have not been held to be employees either at common law or within the meaning of the Act.[21] Indeed, in the *Hearst* case, this Court sustained the Board's finding that the district managers of the newspapers there involved were employees of the publishers, despite the fact that they were not compensated by the publishers on a formal salary basis; that they, rather than the publishers, fixed the price of the papers to the newsboys; and

[21] In *National Labor Relations Board* v. *E. C. Atkins & Co.*, 147 F. 2d 730 (C. C. A. 7), certiorari granted, judgment vacated, and cause remanded, 325 U. S. 838, decision on remand, May 31, 1946, certiorari granted, No. 419, this Term, the Circuit Court of Appeals for the Seventh Circuit held that militarized plant guards who "took [their] instructions *in toto* from the military authorities," and over whom the Company "exercised no control," were not employees of the Company. No such issue is presented here.

that they exercised complete supervisory powers over the newsboys, 322 U. S. 111, 118, note 15. Compare, *Matter of Star Publishing Co.*, 4 N. L. R. B. 498, 504–505, enforced, 97 F. 2d 465 (C. C. A. 9). The Company attacks, instead, by indirection. It argues that foremen are "employers" within the meaning of Section 2 (2) of the Act which defines "employer" to include "any person acting in the interest of an employer, directly or indirectly," that the same persons cannot, in logic, be "employees" within the meaning of the Act as well, and that therefore the statutory term "employee" must be given a special arbitrary meaning quite alien to the inescapable facts of the "economic relationship" between foremen and their employers. This position is neither logically sound nor consistent with economic facts or the purposes of Congress.

1. Foremen are employers for some purposes and employees for other purposes

Judicial authority long ago rejected the Company's basic premise that a man cannot be an "employer" for some purposes and an "employee" for others. "A foreman, in his relation to his employer is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of Section 2 (2) of the Act." *National Labor Relations Board* v. *Skinner & Kennedy*, 113 F. 2d 667, at 671 (C. C. A. 8). Accord: *American Steel Foundries* v. *National*

Labor Relations Board, C. C. A. 7, decided December 28, 1946; *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886. Cf. The *Hearst* case, *supra*, 322 U. S. at p. 118, n. 15. As applied to foremen, the definitions of "employer" and "employee," therefore, "are not mutually exclusive." *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570 (C. C. A. 10), certiorari denied, October 14, 1946, No. 375, this Term. In accordance with the principle outlined above (pp. 39–40 see also pp. 56–60, *infra*), the applicability of the two concepts must be determined "in the light of the mischief to be corrected and the end to be attained." *Ibid.*

There is nothing novel about this analysis. The law recognizes many dual relationships. A man may be both a beneficiary and a trustee of the same trust at the same time (Restatement of the Law of Trusts, Secs. 99, 115; see also Sec. 183); a man may be both creditor and stockholder of the same corporation; and each member of a partnership is both agent and principal of each of the others. The courts long ago recognized that a supervisor occupies the dual role of employee in relation to the company which employs him and employer in relation to his subordinates (pp. 53–56, *infra*). The novelty is all on the Company's side, since its argument would logically exclude all employees from the scope of the Act. With respect to the public at large, rank and file employees, as much as super-

visory employees, act in the interest of their employers. To argue that they, therefore, cannot be treated as employees within the Act would be absurd. The answer to such an argument comes immediately to mind: rank and file employees do not act in the interest of their employer when they are bargaining with him about their working conditions. Neither do foremen.

The only distinction between rank and file employees and foremen which could possibly be relevant here is the fact that employers confer upon foremen power to direct and control the work performance and, to some extent, job security of rank and file employees. But this power does not aid the foremen in their own dealings with the employer. In those dealings they face the employer with no more and no less economic power than do the rank and file employees. The economic relationship between foremen and their employers, as we show below, pp. 56–60, is precisely that in which Congress found inequality of bargaining power to exist between, on the one hand, "employees who do not possess full freedom of association or actual liberty of contract" and, on the other hand, "employers who are organized in the corporate or other forms of ownership association." The vice in the Company's argument is that it misconstrues this Congressional concept of antithetical categories in the employment relation; a concept which views as the parties to the contract

of employment the employees who receive wages, on the one side, and the employers who pay them, on the other.[22] Obviously foremen are not employers in this, the only sense which would preclude them from being considered employees.

The Company's entire argument rests on the obviously fallacious premise that the interests of all persons within the purview of the Act are allied exclusively either with "management" or with "labor," and that when persons whose interests lie with "management" join a labor organization a conflict of interest is created which did not exist before. But conflict of interest between foremen and their employers is equally present whether foremen bargain individually or collectively; the employee's concern in advancing his own economic status does not vanish or even become subdued merely because upon promotion to supervisory work he represents management's interests in dealing with subordinates. As noted by Chairman Herzog in his concurring opinion (R. I, 32–33),

[22] That Congress considered the category of actual employers, as distinguished from those to whom employer status could for some purposes be imputed, to include only persons who owned a business enterprise in whole or in part appears clearly from Section 2 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U. S. C. 101, *et seq.*, in which employees are contrasted with "owners of property [who] organize in the corporate or other forms of ownership association." In Section 1 of the National Labor Relations Act the term "employers" was substituted for the phrase "owners of property," and the balance of the clause was repeated verbatim.

whenever foremen and their employers "sit on the opposite sides of the bargaining table their interests are momentarily adverse. This is true whether they bargain individually or collectively." Union membership and collective bargaining, then, no more create a division of interest on the part of foremen than on the part of rank and file employees. Application of the provisions of the Act to this field, far from creating a conflict, extends to an existing conflict those "practices fundamental to the friendly adjustments of disputes" which Congress sought to encourage as a substitute for industrial strife (Act, Section 1). It is aimed precisely at "the mischief to be corrected." *Armour* case, 154 F. 2d at 574. And, as we shall demonstrate below, extension of the benefits of self-organization and collective bargaining to supervisors does not jeopardize legitimate employer interests in their faithful performance of duty (*infra*, pp. 66–86).

The inclusion of persons "acting in the interests of an employer" within the statutory definition of "employer" is explained by the purpose of the definition. Congress sought, by defining "employer" in the broadest possible terms, to reach infringements of the rights guaranteed employees which were accomplished by agents of employers as well as by employers themselves. By making such agents subject to the restraints which Section 8 of the Act lays upon "employer[s]", Congress

enabled the Board to guard against all infringements upon organizational freedom accomplished through the exercise of economic power over employees. The definition of "employer" therefore comes into play under the Act only for the purpose of determining whether the statute authorizes sanctions against particular persons who engage in conduct inimical to the statutory interests of employees.[23] The breadth of the definition permits the Board to restrain violations of the Act committed even by strangers to an enterprise, who, acting in the employer's interest or with his connivance or approval, infringe the rights of employees.[24] It would likewise sanction the issuance of orders against supervisory employees who utilize the power vested in them by the employer to coerce their subordinates, and against rank and file employees who, at the employer's instance, translate the employer's pro- or anti-unionism to their fel-

[23] *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 146 F. 2d 718, 720 (C. C. A. 6), certiorari granted on other points, judgment vacated, case remanded for further consideration, 325 U. S. 838, decision on remand, 154 F. 2d 932, certiorari granted, No. 418, this Term.

[24] See, *National Labor Relations Board* v. *Taylor-Colquitt Co.*, 140 F. 2d 92, 93 (C. C. A. 4); *National Labor Relations Board* v. *Northwestern Mutual Fire Association*, 142 F. 2d 866, 867–868 (C. C. A. 9), certiorari denied, 323 U. S. 726; *National Labor Relations Board* v. *Sun-Tent Luebbert Co.*, 151 F. 2d 483 (C. C. A. 9), certiorari denied, October 14, 1946, sub. nom. *Merchants & Mfgs. Assn. of Los Angeles* v. *National Labor Relations Board*, No. 109, this Term.

lows.[25] But the Board has not issued such orders against either supervisory or rank and file employees. It has not found it necessary to treat supervisory or rank and file employees as "employers" to remedy violations of the Act.

Where supervisors misuse the power vested in them by the employer to infringe the rights of subordinates the Board holds the employer responsible.[26] For the mere delegation of economic power over wages, hours, and working conditions to subordinates cannot serve to relieve the employer of his duty under the Act to prevent utilization of that economic power in a manner which tends to restrict the organizational freedom of employees. Neither, of course, can the employer escape responsibility for coercive conduct of rank and file

[25] Compare, *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 80–81; *Atlas Underwear Co.* v. *National Labor Relations Board*, 116 F. 2d 1010 (C. C. A. 6); *Triplex Screw Co.* v. *National Labor Relations Board*, 117 F. 2d 858, 860 (C. C. A. 6); *National Labor Relations Board* v. *New Era Die Co.*, 118 F. 2d 500, 504 (C. C. A. 3); *National Labor Relations Board* v. *Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 664 (C. C. A. 5); *Clover Fork Coal Co.* v. *National Labor Relations Board*, 97 F. 2d 331, 335 (C. C. A. 6); *National Labor Relations Board* v. *Sunshine Mining Co.*, 110 F. 2d 780, 792 (C. C. A. 9), certiorari denied, 312 U. S. 678.

[26] *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514, 520; *National Labor Relations Board* v. *Moench Tanning Co.*, 121 F. 2d 951, 953 (C. C. A. 2); *Birmingham Post Co.* v. *National Labor Relations Board*, 140 F. 2d 638, 639–640 (C. C. A. 5).

employees which he has authorized or ratified or is under a duty to prevent.[27]

These principles, which have been well established since the earliest days in the administration of the Act, have never been affected by the Board's recognition, for an equally long period, as we shall show (*infra*, pp. 52–56), that supervisors, as well as rank and file employees are protected by the self-organizational guarantees of Section 7 of the Act. Supervisory employees may fully exercise their rights of self organization so long as they do not interfere with the organizational rights of subordinate employees. That the exercise by supervisory employees of organizational rights need not interfere with the rights guaranteed subordinate employees under the Act is apparent from the facts of the instant case. The organization of the Company's foremen into the Association, an unaffiliated labor organization, the membership of which is confined to supervisory employees, does not *per se* constitute any threat of interference with the affairs of the rank and file employees. Nor would the fullest activity of the foremen on behalf of the Association in securing collective bargaining with the

[27] *Reliance Mfg. Co.* v. *National Labor Relations Board*, 125 F. 2d 311, 317–318 (C. C. A. 7); *National Labor Relations Board* v. *General Motors Corp.*, 116 F. 2d 306, 311 (C. C. A. 7); *National Labor Relations Board* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. C. A. 6). See also cases cited, note 25 *supra*.

Company give rise to any such threat. As the Board noted (R. III, 1809), it is nowhere contended that by joining the Association and authorizing it to represent them for purposes of collective bargaining, the foremen have infringed the statutory rights of other employees.

Although the question of organizational activity by supervisors which affects the freedom of rank and file employees is therefore not present in this case, we think it desirable to point out the limitations which the Board has placed upon the conduct of supervisors in the interests of preserving to the rank and file the fullest measure of organizational freedom. The factual patterns which come before the Board present the problem of assessing the impact upon rank and file freedom of particular kinds of organizational activity by supervisory employees. In the instant case, and in cases like *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B., No. 203, where supervisors in the coal mining industry chose to be represented by the powerful labor organization which represented the rank and file, the Board found no threat to rank and file freedom in the conduct of the supervisors. Since in the circumstances presented in the *Jones & Laughlin* case, affiliation of the supervisors with the rank and file union, realistically viewed, could not threaten the independence of the rank and file, the Board announced that it was without power to deprive the supervisors of the right

to select that union as their bargaining representative.

However, particularly in fields where rank and file organization is relatively new, the Board is alert to detect and prevent infringements of rank and file freedom which may inhere in organizational activity by supervisors which goes beyond mere selection by them of the same bargaining representative which represents the rank and file employees. Thus, in *Matter of Climax Engineering Co.*, decided July 30, 1946, 66 N. L. R. B. 1359, the Board found that the mere wearing of union buttons by supervisors identical with those worn by rank and file employees, might "form a barrier, though no doubt a slight one, to the full exercise by subordinates of their freedom of choice." The Board concluded that this activity by supervisors, under the circumstances of that case, was therefore not permissible and that an employer might be justified in taking appropriate action to prevent it. Cf. *Matter of Brown Co.*, 65 N. L. R. B. 208; *Matter of E. Anthony & Sons, Inc.*, 70 N. L. R. B. 717.

In balancing the rights of supervisors against those of rank and file employees, the Board, as its decision in the *Climax Engineering* case, *supra*, shows, properly considers the rights of the rank and file paramount. It has so considered them from the very first. Its conclusion in the instant case and in the *Jones & Laughlin* case, that accom-

modation of the statutory rights of supervisors to bargain collectively through representatives of their own choosing with the statutory right of rank and file employees to be free from interference rendered potent by economic power flowing from the employer, is satisfactorily achieved by precluding supervisors from participating in the organizational affairs of subordinates without at the same time denying supervisors the right to select a bargaining agent to bargain for them, comports exactly with the Board's historical position that supervisors are employees under the Act and are to be protected insofar as such protection is compatible with preservation of the freedom of the rank and file.

Cases involving the rights of foremen and supervisory employees under the Act have arisen since the inception of the Board's administrative history. Uniformly and without a single exception, the Board and every member of the Board who has considered the question, as well as every reviewing court, has held that foremen are employees and entitled to protection against discriminatory or coercive conduct designed to prevent self-organization.[28]

In the first volume of the Board's decisions, in *Matter of Fruehauf Trailer Co.*, 1 N. L. R. B. 68,

[28] Compare the law review comment: Rosenfarb, Joseph. *Foremen on the March*, 7 Fed. Bar. Journal, 168–182; and notes, 59 Harv. L. Rev. 606–611; 55 Yale L. J. 754–777; 13 Univ. Chi. L. Rev. 332–346; 5 Lawyers Guild Rev. 44–48.

76, the Board ordered the reinstatement of a foreman who had been discriminatorily discharged because of his union activity. The order was upheld by this Court in *National Labor Relations Board* v. *Fruehauf Trailer Co.*, 301 U. S. 49, which was one of the five cases in which the constitutionality of the Act was initially sustained. In *National Labor Relations Board* v. *Skinner & Kennedy Stationery Co.*, 113 F. 2d 667, 671 (C. C. A. 8), enforcing 13 N. L. R. B. 1186, 1192–1193, also involving the discriminatory discharge of a foreman, the employer specifically contended that foremen are not employees under the Act. The court sustained the Board's order of reinstatement and stated that "A foreman, in his relation to his employer, is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of Section 2 (2) of the Act." The court concluded "That nothing in the Act excepts foremen from its benefits nor from protection against discrimination nor unfair labor practices of the master." Subsequently, in *Eagle-Picher Mining and Smelting Co.* v. *National Labor Relations Board*, 119 F. 2d 903, 911 (C. C. A. 8), enforcing as modified in respects not here material, 16 N. L. R. B. 727, 822–829, a chemist who was head of the employer's research department, earning in that position from $450 to $591.66 per month and who hired the research chemists working under him, was held to be an employee and

his reinstatement ordered by the same circuit court of appeals. In *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886, enforcing 54 N. L. R. B. 679, there was involved the employer's refusal to bargain collectively with the duly elected representatives of a unit composed of ship captains or masters as well as mates and pilots. The court rejected the contention that masters, since they specifically represented the owner and were charged with maintaining discipline on board ship, should be excluded from a bargaining unit of masters, mates, and pilots, and it enforced the Board's order requiring the employer to bargain collectively with the National Organization of Masters, Mates, and Pilots for all classes of employees included in the unit sought by the union. The court below followed this uniform line of authority (R. III, 2104–2105). The most recent case involving the status of supervisory employees under the Act is the decision of the Circuit Court of Appeals for the Seventh Circuit in *American Steel Foundries* v. *National Labor Relations Board*, decided December 28, 1946 in which that court held, as it had earlier held in *R. R. Donnelley Co.* v. *National Labor Relations Board*, 156 F. 2d 416, petition for a writ of certiorari filed No. 790, this Term, that foremen are employees, and in which it sustained a Board order requiring the employer to reinstate with back pay

two supervisory employees who had been discharged because of their activities in and on behalf of the Foreman's Association of America. In a number of other cases, the courts and the Board have held that supervisory employees of varying degrees of managerial authority are employees and entitled to protection under the Act against discriminatory or coercive conduct designed to prevent self-organization.[29]

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[29] *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, enforcing 1 N. L. R. B. 201, 222–225; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. 2d 488, 493 (C. C. A. 9), certiorari denied, 306 U. S. 643, enforcing 3 N. L. R. B. 140, 158–159; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 870–871 (C. C. A. 2), certiorari denied, 304 U. S. 576, enforcing as modified 2 N. L. R. B. 626, 678; *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465 (C. C. A. 9), enforcing 4 N. L. R. B. 498, 504–505; *National Labor Relations Board* v. *Luzuray, Inc.*, 123 F. 2d 106, 108–109 (C. C. A. 2), enforcing 16 N. L. R. B. 37, 42–45; *National Labor Relations Board* v. *Richter's Bakery*, 140 F. 2d 870 (C. C. A. 5), certiorari denied, 322 U. S. 754, enforcing 46 N. L. R. B. 447, 450, 474–479; *National Labor Relations Board* v. *Whiting-Mead Co.*, 148 F. 2d 817 (C. C. A. 9), enforcing 45 N. L. R. B. 987, 1015–1018; *Matter of Warfield Co.*, 6 N. L. R. B. 58, 61–64; *Matter of Atlantic Greyhound Corp.*, 7 N. L. R. B. 1189, 1196; *Matter of Horace Prettyman*, 12 N. L. R. B. 640, 655–656, order set aside on other grounds, 117 F. 2d 786 (C. C. A. 6); *Matter of Chambers Corporation*, 21 N. L. R. B. 808, 829–830; *Matter of Condenser Corp.*, 22 N. L. R. B. 347, 386–389, enforced, 128 F. 2d 67, 74–75 (C. C. A. 3); *Matter of Golden Turkey Mining Co.*, 34 N. L. R. B. 760, 776–779; *Matter of Soss Mfg. Co.*, 56 N. L. R. B. 348; cf. *Hazel Atlas Glass Co.* v. *National Labor Relations Board*, 127 F. 2d 109, 117–118 (C. C. A. 4).

In each of the foregoing cases, moreover, with the exceptions of the *Richter* and *Eagle-Picher* cases, the supervisory employee, whose discharge was remedied by the Board order being enforced, was a member of a labor organization and, in each case, the union membership and activity of the supervisory employee in question impelled his discharge. In each of those cases, moreover, except the *Hazel Atlas* and *American Steel Foundries* cases, the labor organization of which the foremen were members was composed of rank and file employees.

The Board's accommodation of the rights of supervisors to the rights of rank and file employees as we have shown, (*supra*, pp. 50–52) preserves to rank and file employees freedom from abuses stemming from the economic power with which supervisors are vested by employers. The Board's recognition of the rights of supervisors to bargain collectively with employers in their own interests is likewise firmly grounded, as we shall show, in the facts of the economic relation between supervisors and their employers and in the premises of the Act as applied to that relation.

2. The economic relation between foremen and their employers requires treatment of foremen as "employees" within the meaning of the Act

In the absence of self-organization and collective action by foremen, their wages, hours, and other working conditions are fixed, theoretically,

by individual bargaining with their employer. In practice, however, the bargaining power of individual foremen *vis-a-vis* the employer, like the bargaining power of individual non-supervisory employees, is so small that the system is tantamount to unilateral employer determination of their terms and conditions of employment. The foreman-employer relationship, like the "typical employer-employee relationship [does] not have even the appearance of trading or bargaining. The employer simply notif[ies] the worker what wages he [is] to get and the hours he [is] to work."[30] The employees, in turn, "are practically constrained to obey * * *." *Holden* v. *Hardy*, 169 U. S. 366, 397. The record here demonstrates the truth of this observation as applied to the relations between the company and its foremen. See *supra*, note 6, pp. 14–15.

To such a situation the announced statutory objective of "restoring equality of bargaining power between employers and employees" obviously applies. "The very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with

[30] Testimony of Bishop Francis Haas, Member of the National Labor Board established under Section 7 of the N. R. A. before a Senate Committee considering the Wagner Bill. *Hearings*, Senate Committee on Education and Labor, on S. 2926, 73rd Cong., 2nd Sess., Pt. 1, p. 116. The economic material in this brief was prepared with the assistance of Louis Schwartz, Associate Industrial Analyst on the staff of the Board.

terms which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co.* v. *National Labor Relations Board*, 321 U. S. 332, 338. It is, of course, no answer to say that the particular terms unilaterally offered by any employer to individual employees are favorable to the employees' interests. It is impossible to show that, however favorable the terms unilaterally conferred upon employees by the employer may be, terms arrived at through collective bargaining might not be more favorable.[31] Even if such a showing could be made, however, it would not dispose of the issue,[32] for, as the Board here pointed out, the basic grievance of foremen, like the basic grievance of all employees, is "the denial by their employer of their right to participate in the decisions which affect their welfare as employees" (R. III, 1812).[33] Since effective partici-

[31] *Virginia Electric & Power Co.* v. *National Labor Relations Board*, 319 U. S. 533, 542-544.

[32] Cf. *Corning Glass Works* v. *National Labor Relations Board*, 118 F. 2d 625, 629 (C. C. A. 2); *Western Union Telegraph Co.* v. *National Labor Relations Board*, 113 F. 2d 992, 997 (C. C. A. 2).

[33] The Committee appointed by the National War Labor Board to study foremen's grievances commented as follows on this point (R. III, 1763, 1913-1914):

"Foremen have observed the increasing definiteness with which the terms of employment and working conditions are specified by contract for the rank and file workers. Many foremen have been promoted during the war from the rank and file where such conditions existed. As foremen they found uncertainties concerning their rights and prerogatives. The rules or policies governing sick leave, vacations, promotion, transfer and demotions were often not in writing and

pation by employees in making such decisions is possible only if they act together by bargaining collectively with their employer, the desire of foremen "to have a voice in making the decisions that vitally affect their everyday lives," like the same desire of non-supervisory workers, is "one of the primary motives for union membership."[34]

The existence of this grievance and its potency to engender industrial strife were recognized by Congress in the statute. In the absence of any

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were inadequately understood. They were sometimes not explained. Grievances typically had to be presented personally and without the assistance of a steward or the support of an organized group. This situation could be compared with the effective grievance procedures for the organized rank and file. The fact that all foremen were not treated alike aroused suspicions of discrimination and a feeling of insecurity. The lack of assurance that there were uniform rules uniformly applied was a source of dissatisfaction.

"The foreman had little or no participation in determining the terms of his employment, nor did he have any representative speaking up for him in the councils of management to press his case. If such occurred, it was more likely a considerate superior than an interest (sic) representative. The whole relationship of the foreman to higher management was too remote to inspire a sense of participation either in determining his own terms of employment or in formulating policies which he was obligated to execute.

"This combination of conditions did not inspire self-respect nor lend dignity to the position of foremen."

[34] Golden, Clinton S. and Ruttenberg, Harold, Jr., *The Dynamics of Industrial Democracy* (New York, 1942), p. 82. "The real importance of collective bargaining consists in the fact that it offers wage-earners the opportunity to participate effectively in determining the conditions under which they work." Twentieth Century Fund, *Labor and the Government* (New York, 1935), pp. 5–6.

clear indication that Congress did not intend to give statutory redress to this grievance when held by foremen, the Board is duty bound to follow the policy enjoined upon it by Congress of "encouraging the practice and procedure of collective bargaining," the practice declared by Congress to be "fundamental to the friendly adjustment of industrial disputes," to the end that the "refusal by employers to accept the practice and procedure of collective bargaining" need not provoke strikes with their attendant disruption of commerce.

D. *The legislative history of the Act*

The Board found no indication in the Act, its legislative history, or in any extrinsic materials, that Congress intended to exclude foremen from the benefits of the Act.

1. The preceding railway labor legislation

As the Board early noted,[35] the inclusion of "subordinate officials" of carriers as defined by the Interstate Commerce Commission within the definition of "employees" contained in the Railway Labor Act (44 Stat. 577, 45 U. S. C. 151) is a a clear indication of Congressional policy to extend the protection of collective bargaining rights to this

[35] *Matter of Union Collieries Coal Company*, 41 N. L. R. B. 961, 44 N. L. R. B. 165; *Matter of Godchaux Sugars, Inc.*, 44 N. L. R. B. 874.

class of employees.[36] It affords conclusive proof that Congress did not consider such an extension subversive of management prerogatives or American business. Neither did the railroads who, together with the railroad unions, drafted and wholly approved of the 1926 Railway Labor Act in which the same language appears.[37]

Congress, in drafting the National Labor Relations Act, used not narrower, but broader language, including "any employee," with stated exceptions. Since the National Labor Relations Act was avowedly "an amplification and further clarification of the principles" of the Railway

[36] Section 1 (5) of that Act provides:
"The term 'employee' as used herein includes every person in the service of a carrier * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *."
The Congressional policy of extending the benefits of recent social legislation to supervisory employees has not been confined to the Railway Labor Act. Compare the Merchant Marine Act of 1936, 52 Stat. 966, 46 U. S. C. 1253 (c), and the Social Security Act, 49 Stat. 647, 26 U. S. C. 1426 (d). Indeed, where Congress has desired to exclude certain persons who would normally be considered "employees" from the benefits of a particular statute it has acknowledged their status as "employees" and explicitly provided for their exemption. See, for example, the Fair Labor Standards Act of 1938, 52 Stat. 1060, 29 U. S. C. 203 (e) and 213 (a) (1).

[37] 44 Stat. 577, Sec. 1, Fifth; Report of the House Committee on Interstate and Foreign Commerce on H. R. 9463, H. Rep. No. 328, 69th Cong., 1st Sess., p. 1; Report of the Senate Committee on Interstate Commerce, on S. 2306, S. Rep. No. 222, 69th Cong., 1st Sess., p. 2.

Labor Act,[38] the use of this more general language can hardly be given a restrictive significance. Rather it must be concluded, as the Board did conclude,[39] that

> * * * the wide and changing variety of collective bargaining forms and practices in the large industrial area subject to the jurisdiction of the Labor Relations Act impels the view that Congress, rather than attempting an exact definition, left to the administrative determination of the Board in each case the duty of deciding whether a particular type of worker, not specifically excluded, is within the ambit of the unfair labor practice Sections of the Act.

This reading of the legislative history comports with the conclusion reached by this Court in the *Hearst* case that, in defining the term "employee" in general rather than in specific terms, Congress left it to the Board to decide particular questions of coverage in the light of the purposes of the Act.

2. Congressional references to "workers" and "laborers"

Nor do the Company's references to terms such as "workers" and "laborers" in the Act, the legislative history, and certain court decisions,

[38] H. Rep. No. 1147, 74th Cong., 1st Sess., p. 3.

[39] *Matter of Soss Manufacturing Company*, 56 N. L. R. B. 348, 350.

throw any light on this problem. Undoubtedly these words were viewed by their users as synonymous with "employee" and their use was merely a convenient device to avoid repetition. There is no reason to assume that they were intended as implied limitations on the natural meaning of "employee". Indeed, in view of the explicit sweeping definition of that term in Section 2 (3) of the Act, there is no need or justification for a search for hidden implications elsewhere. Like the word "employee", the words "worker" and "laborer" are certainly broad enough to apply to foremen whose work is closely connected with the production lines.[40] The identical argument which the Company here urges as a bar to the recognition of supervisors as employees within the meaning of the Act, has been urged as a bar to the recognition of clerical and other non-manual workers as employees.[41] The argument, found lacking in merit as applied to those employees,[42] is equally lacking in merit here.

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[40] Note 18, 19, pp. 34–35, *supra*.

[41] *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570 (C. C. A. 10), certiorari denied, October 14, 1946, No. 375, this Term.

[42] Clerical and other nonmanual workers have uniformly been held to be entitled to the benefits of the Act. *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570 (C. C. A. 10), certiorari denied, October 14, 1946, No. 375, this Term; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 129; *National Labor Relations Board* v. *Bank of American Nat. Trust & Savings Assn.*, 130 F. 2d 624 (C. C. A. 9); *National Labor Relations Board* v. *Clarks-*

3. The extent of foremen's organization at the time of passage of the Act

Unsound also, as the Board found, is the Company's contention that the Act is to be construed as applicable only to those classes of employees which had attempted to organize and bargain collectively, or had engaged in strikes, prior to the passage of the Act. Even if it were true that supervisory employees had not attempted to engage in collective bargaining prior to the passage of the Act, this fact would in no way limit the Board's jurisdiction. The Act is not emergency legislation designed as an *ad hoc* remedy for a preexisting condition. Rather it is permanent, broad legislation, designed to achieve the purposes stated in its first Section: to encourage self-organization and collective bargaining, to equalize the bargaining power of employees with their employers so that employees might achieve an effective voice in the determination of their terms and conditions of employment. Manifestly, such a purpose contemplated self-organization among employees then unorganized and extension of the practice of collective bargaining into areas in which it did not then exist.

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burg Publishing Co., 120 F. 2d 976 (C. C. A. 4); *Eagle Picher Mining & Smelting Co.*, 119 F. 2d 903, 911 (C. C. A. 8); *Aluminum Ore Co.* v. *National Labor Relations Board*, 131 F. 2d 485, 486 (C. C. A. 7); See, McIver, Wagner and McGirr, *Technologists' Stake in the Wagner Act* (American Association of Engineers, 1944).

In fact, however, as we have shown (*supra*, p. 18), self-organization among supervisors was common when the Act was passed. Moreover, prior to that date, administrative agencies established to administer Section 7 (a) of the National Industrial Recovery Act, 48 Stat. 195, issued decisions which applied the self-organization guarantees of that Section to supervisory employees.[43] "Congress, in enacting the National Labor Relations Act, had before it the record of this experience." *H. J. Heinz Co.* v. *N. L. R. B.*, 311 U. S. 514, 524. In view of these facts, the failure expressly to exempt supervisors from the definition of "employee" is persuasive of an intention to continue to afford them protection.

4. Congressional acquiescence in the Board's interpretation

Finally it should be noted that although the Board, in its earliest days, adopted and thereafter consistently maintained the view that supervisors are employees within the meaning of the Act and has uniformly protected all supervisors against interference and discrimination in the exercise of those rights, Congress has never declared the Board's interpretation of the Act erroneous. Indeed, Congressman Smith of Vir-

[43] *Matter of Available Truck Co.*, 2 N. L. R. B. (old) 68; *Matter of Geudel, Paeschke & Frey Co.*, 2 N. L. R. B. (old) 393; *Matter of Pennsylvania-Dixie Cement Corp.*, 2 N. L. R. B. (old) 417.

ginia, on February 25, 1943, introduced a bill to amend the National Labor Relations Act by excluding from the definition of "employee" in Section 2 (3) "any individual employed in a bona fide administrative, professional, or supervisory capacity", H. R. 1996, 78th Cong., 1st Sess. The bill was referred to the Committee on Labor (89 Cong. Rec. 1353) and was never reported to the House. Among amendments to the Wagner Act recently proposed in the Case Bill, H. R. 4908, 79th Cong., 2nd Sess., was one excluding supervisory employees from the definition of "employee" contained in Section 2 (3). The President's veto of this amendatory legislation was sustained (92 Cong. Rec. 6798, 6801). This history affords some evidence that Congress assumed that the National Labor Relations Act as originally enacted applied to supervisors.

E. *Statutory protection of foremen's right to organize and bargain collectively does not jeopardize employer interests in the faithful performance of supervisory duties*

The Company argues that the plain language of the Act should be distorted in the manner it suggests because, if it were required to bargain collectively with a union of foremen, the foremen would no longer have single-minded devotion to

the interests of management; their allegiance would be divided between management and the union. This division of allegiance, the Company contends, would preclude management from relying on the judgment and discretion of foremen, since, allegedly, management could not be certain whether the foreman's judgment in any instance was influenced solely by consideration of the welfare of the Company, or, in part at least, by a desire to promote the interests of his union. Those interests, it is further contended, are intimately bound up with the interests of the union to which rank and file employees belong and may well, therefore, influence the foreman in his dealings with his subordinates. This, according to the Company, would result in disruption of established managerial techniques and would give "alarming impetus to the collectivization of industry now [according to the Company] going on" (Brief before the Board in the representation case, pp. 98, 99).

This argument is simply a broadside attack on the honesty of foremen. The Company assumes that the foreman's interest in his union will lead him to betray the interests of his employer. The assumption is entirely unjustified. Neither the argument nor the assumption has any greater

weight when applied to foremen than when applied to plant guards, to newspaper editorial writers, to confidential employees, or indeed, to all employees upon whose judgment, discretion, and faithfulness employers must rely in the conduct of their business. In meeting this argument, which has been rejected by Congress,[45] the Board and the Courts have refused to assume, as the Board here refused to assume, "that self-organization for collective bargaining would prove incompatible with * * * faithful performance of duties" (R. III, 1811).

1. Faithful performance of supervisory duties may be adequately insured by punishing breaches when they occur

At the very outset it is important to recognize that the conflict of interests which the company fears will unduly influence its foremen does not come into being when foremen organize; it exists as soon as foremen are employed. The interests of foremen, like other employees, undoubtedly coincide in large part with those of the employer, because of mutual interest in the welfare and progress of the enterprise (*infra*, p. 70). They also inevitably conflict in the area of determining the foreman's compensation and other working conditions. If we adopt the company's specula-

[45] See, e. g., Hearings on S. 1958 before the Senate Committee on Education and Labor, 74th Cong., 1st Sess., Pt. 3, p. 479; Hearings on H. R. 2239 before the House Committee on Military Affairs, 78th Cong., 1st Sess., p. 758.

tive approach, we must anticipate that the unorganized foreman will allow his personal interests to interfere with his work as much as the organized foreman. A foreman whose request for a raise has been denied may vent his spleen against the employer in any number of ways which may involve breach of duty; another may attempt to stay in the good graces of his employer by improperly concealing his own errors. The threat of this kind of misstep stems from the employer-employee relationship. It is not created by the foremen's decision to act either individually or collectively to advance their own interests in relation to the employer.

An employee's interest in furthering his own cause, individually or by advancing the cause of his union, does not differ even in degree, and certainly not in kind, from many influences to which foremen as well as other employees are subject as human beings. Desires to maintain personal friendships, to favor coreligionists, fellow club members, or adherents of similar political views; these impulses and many more are constantly at work. But these allegiances have never been regarded as necessarily incompatible with the faithful performance of duty, and the company does not complain that because they exist, it is unable to place trust and confidence in the judgment of its foremen. Any foreman may, and most probably does, occasionally

arrive at a faulty decision as a result of one or more of these factors, but allegiance to a union is no more likely thus to rob a foreman of his sense of responsibility to his employer than are these other allegiances. As the Board pointed out in *Matter of L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298, 304, n. 17, "Manifestly, the unionized, as well as the non-unionized foreman has at least a selfish interest in the success of the business from which he draws his livelihood, and this interest is likely to have a powerful restraining influence upon any displays of union loyalty which might adversely affect his employer." (Cf. R. II, 1067). Also, the foreman's "instinct of workmanship,"[46] his pride in doing a good job, as well as his native honesty, are not so easily overcome.

In view of these facts, the fiduciary principles of the common law which the Company would here apply are entirely inapposite. Those principles, familiarly applied to property transactions, operate only to prohibit a fiduciary from utilizing his fiduciary position[47] in such a manner as to further conflicting financial interests. They do not bar from fiduciary position persons who may find any of their own interests in opposition to

[46] Veblen, Thorstein, *The Instinct of Workmanship* (New York, 1922), pp. 25, 33.

[47] Even a trustee may, of course, act contrary to the interest of beneficiaries with respect to matters outside the trust. *Restatement of the Law of Trusts*, Sec. 2, Comment (b).

the interests of those whom, as fiduciaries, they are bound to serve.[48] Such a situation is presented with respect to corporate managers and directors whose personal interests are "often radically opposed" to those of the stockholders.[49] Yet the law does not prohibit such managers or directors from continuing to act in a fiduciary capacity; it seeks to prevent and remedy breaches of trust, but does not require divestiture of one interest or the other.[50]

Assuming that a foreman does have a fiduciary relationship with his employer with respect to the performance of his supervisory duties, that relationship is most closely analagous to that of an agent to his principal in, for example, an agency for the sale of property.[51] Yet it has never been held that such agents may not bargain with their

[48] *Bullivant* v. *First National Bank et al.*, 246 Mass. 324, 141 N. E. 41; *Anderson* v. *Bean*, 272 Mass. 432, 172 N. E. 647, 72 A. L. R. 959; *Dumaine* v. *Dumaine*, 301 Mass. 214, 16 N. E. 2d 623, 118 A. L. R. 834; *In re Johnson's Estate*, 187 Wash. 552, 60 P. 2d 271, 160 A. L. R. 217; *Houghteling* v. *Stockbridge*, 136 Mich. 544, 99 N. W. 759; *O'Neile* v. *Ternes*, 32 Wash. 528, 73 Pac. 692.

[49] Berle & Means, *The Modern Corporation and Private Property* (New York, 1934), p. 122.

[50] *Id.* at Chapter VI, "*The Divergence of Interest Between Ownership and Control*," pp. 119–125; see also Chapter V, "*The Legal Position of Management*," pp. 220–232.

[51] See *Restatement of the Law of Trusts*, Section 2, Comment (b): "The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations. The duties of a trustee are more extensive than the duties of some other fiduciaries."

principals about their commission. It could not even be suggested that such an agent should not join an association of similarly occupied agents because he might be tempted to favor fellow members, in violation of his duty to obtain the highest possible price for his principal.

The solution for such problems in the field of labor relations is the same as that evolved by the common law. The employer may use its disciplinary power to deter departures from supervisory duty and to punish them when they occur, but it may not assume that such departures are certain to occur. The general interest of employees in the welfare of the union to which they belong is certainly not such an interest as would disqualify them from acting faithfully to advance the interests of the employing enterprise. This Court made the point clearly in the *Associated Press* case, 301 U. S. 103. There the employer-publisher contended that were editorial writers permitted to organize and bargain collectively, their loyalty to their union and to labor-union principles would tend to induce them to color and distort their writings. The Court answered this point briefly (301 U. S. at p. 132):

> The act does not compel the petitioner to employ anyone; it does not require that the petitioner retain in its employ an incompetent editor or one who fails faithfully to edit the news to reflect the facts without bias or prejudice * * *. The petitioner

> is at liberty, whenever occasion may arise, to exercise its undoubted right to sever his relationship for any cause that seems to it proper save only as punishment for, or discouragement of, such activities as the act declares permissible.

In *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570, certiorari denied, October 14, 1946, No. 375, this Term, a case involving confidential plant clerks, the Circuit Court of Appeals for the Tenth Circuit, after noting that the argument here advanced applies equally to "any employee who serves faithfully," stated (p. 574):

> Certainly, exclusion from the benefit of the Act is not the price of honest and faithful service. It is true that the knowledge which the plant clerks obtain is of a highly confidential nature and that its disclosure to competitors of Armour might result in injury to Armour. But, we do not think those facts take the plant clerks outside the term, "employee." Armour may require, as a condition of employment, that the plant clerks treat such information as confidential.

So, in the instant case, the Board pointed out that nothing in the statute or its administration "protects disloyal or inefficient employees and the Company may always resort to its normal disciplinary powers to insure faithful and efficient job performance by its employees of all ranks" (R. III, 1811). This power of discipline, like the power

of principals and stockholders to resort to the courts to recover against faithless agents and directors, affords adequate protection to the interests of enterprise. Thus, the Board, like the common-law courts in analagous situations, considered both the interest of the employer in faithful performance of supervisory duty, and the interest of foremen in dealing on their own behalf collectively rather than individually, and concluded that both interests could be safeguarded under the statute by granting protection to the foremen's self-organizational activities while at the same time recognizing that the employer's power to discipline and discharge for breach of duty remains unimpaired. In balancing these interests and reaching the conclusion which it did, the Board performed the function entrusted to it by Congress in a wholly reasonable manner. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793; *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811 (C. C A. 7).

2. Withholding of statutory protection would not insulate the foremen from pressures caused by rank and file or supervisory organization "

To eliminate all of the company's fears and eradicate entirely the possibility of hidden influences, it would be necessary to isolate the foreman completely from the industrial scene. The rem-

edy urged by ~~respondent~~ the Company, withholding the protection of the Act, would not achieve its end. Foremen would still be legally free to organize and, where they did so, feelings of loyalty to their organization would exist.

Moreover, even if foremen were prohibited by law from organizing, they could not be precluded from having feelings, perhaps quite lively ones, about the rank and file unions in their plant. They could not be forced to abjure, immediately on promotion out of the ranks, the feelings which they entertained about the rank and file union to which, until then, they either belonged or were opposed. And their day-to-day dealings with the rank and file, both on a social basis and in their capacity as supervisors, might change, but would certainly not eradicate, their feelings with respect to the organization which plays a vital role in the plant. Specifically, one foreman may believe that his wages will rise only if the production workers succeed in getting a raise. Another may feel that success on the part of the production workers will make the employer less generous to his classification. Either one may attempt, improperly, to further or oppose the interests of the rank and file, but this possibility would not be increased by the establishment of collective bargaining relationships between employers and supervisors. Indeed, the availability of self-organization would tend to make foremen less dependent on the

assistance of others. If foremen could not hope to bargain about their working conditions through their own organizations, they would be forced to view their fortunes only in terms of the conditions secured by the collective action of the rank and file. Surely, in such a situation, the temptation to further or hinder the struggles of the rank and file organizations would be no smaller than it would be if the foremen could look to their own organizations to further their interests directly. The possibility which must in fact be causing the company concern is not that foremen will misuse their positions as foremen to assist the rank and file but rather that they may, at such times as they consider it in their interest to do so, make common cause with rank and file unions to engage in parallel concerted activities. But if they should do so, they would be in no different position from employees in two or more rank and file bargaining units engaging in a joint strike. Indeed, the process of orderly collective bargaining which the Act guarantees may eliminate that eventuality altogether. Denying the protection of the Act to foremen will not prevent strikes. It will merely add another provocative cause of strikes.

In sum, the conflict of interest which necessarily exists merely because foremen work for employers cannot be resolved by denying the protection of the Act, and specifically its protection

of the right to bargain collectively. Moreover, the fact that self-organization by foremen for the purpose of collective bargaining is not prohibited by law makes it apparent that to deny bargaining rights is, as the Board has held (cf. R. III, 1813–1814), "a policy of negation, settling none of the problems created by foremen's unionization and further increasing labor strife" (*Matter of L. A. Young Spring & Wire Corp.*, 65 N. L. R. B. 298, 304).

3. Collective bargaining between foremen and employers leaves ample room for the protection of employer interests

In another important respect, the Company's effort to attribute disastrous results to the Board's decision fails to square with reality. It assumes that, once its foremen are represented by a labor organization, that organization would be in a position to "force top management to accept its decisions or the decisions of some outside third party" (Brief before the Board in the representation case, p. 82). This is but a special application of the objection sometimes voiced by employers to having "some outsider come in and tell me how to run my business." The simple answer is that if the Company bargains with the Association, the conditions which prevail will be, not those demanded by the Association, but those arrived at in the process of collective bargaining. There is

certainly no reason to assume either that the Association will make unreasonable demands upon the Company or that the Company will be required to yield to such demands if made. Cf. *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board*, 146 F. 2d 833, 835 (C. C. A. 5), certiorari denied, 325 U. S. 886.

The Company attempts to illustrate its point by asserting that since unions generally and the Association in particular believe in the principle of seniority, bargaining with the Association would result in "a system under which [foremen] could only advance by passage of time" (brief before the Board in the representation case, p. 81). It is manifestly absurd to presume that the Association would insist upon or secure any such arrangement. The process of collective bargaining is sufficiently flexible to allow full play to such factors as ability in the selection of supervisory employees. The precise weight to be given to the factor of seniority is susceptible to discussion and agreement. It cannot be assumed that, once the Company bargains collectively with its foremen, it will be required to apply the same seniority standards to them as it applies to rank and file employees. The Company concedes that it is now its policy "to recognize length of service where merit is equal". (Brief before the Board in the representation case, p. 81.) The institution of collective bargaining with the Association

would in all probability require no change in this policy. This is shown by the terms of the Association's contract with the Ford Motor Company (Section 10 (a), which provides (R. I, 86, III, 1334):

> In matters of promotion and demotion the determining factors shall be ability and seniority. When ability is considered to be equal, seniority shall govern promotions and demotions. The final determination shall be ability. If the company's determination of this factor shall be deemed to be unreasonable, any claimed violations of this provision may be reviewed and determined through the grievance procedure.

There is no reason to anticipate insuperable obstacles to a similar reconciliation of interests applicable to the company's foremen.

The history of the status of foremen in the printing trades illustrates the accommodation of trade union practice to the necessities of full production. A careful study of the development describes the situation as follows:[52]

> In early years, many publishers were strongly opposed to having their representatives owe allegiance to the union. As contracts became more inclusive, however, and rights of both employers and unions more clearly defined, publishers in gen-

[52] *How Collective Bargaining Works*, Twentieth Century Fund (New York, 1942), pp. 67, 68, 147.

eral ceased to object to the foreman law. They are now chiefly concerned lest foremen should be subject to union discipline for differing with the local union in the interpretation of the terms of a contract. The internationals generally recognize the justice of the publishers' position and a method is provided for the joint settlement of such disputes. The unions do not, however, forego their right to discipline foremen for disobeying laws relating to internal union matters, or for deliberately disregarding union rules. Although there is still occasional complaint that some locals attempt, by disciplining foremen, to enforce conditions not provided for in contracts, the practice is not so common as to constitute a major issue.

The foreman represents the employer in dealing with grievances arising in his department. He settles many day-to-day grievances and complaints with the chapel chairman, without recourse to the joint standing committee or to arbitration.

* * * *

In book and job printing the union membership of foremen is so thoroughly established that it does not become an issue except occasionally in a newly organized plant. It is clearly recognized that the foreman's first responsibility is to management. His duty to the union is to administer the agreement fairly in the plant. * * *

In the railroad industry, in which supervisory employees have been extensively organized for many years, the relations of the unions to management have been carefully worked out and the National Mediation Board has not considered the inclusion of such employees within rank and file locals to be a problem.[53]

The experience of these industries shows conclusively that an accommodation can be found between trade-union practices and a supervisory employee's responsibility to management, even in those instances in which the supervisory employee is a member of a rank-and-file union, and irrespective of whether he is a member of a separate local of the union, or of the same local as the rank-and-file employees whom he supervises.

The Company, rejecting completely the prospect that foremen who are union members will remain, as they have thus far remained, faithful representatives of management with respect to the production process, threatens that if the Board's position is sustained management will be required to divest foremen of their authority and responsibility. Relying on the unfounded assumption that only in this manner can disaster be avoided, the Company then complains that this avenue of escape is foreclosed to it by the Board's holding in *Matter of Allis-Chalmers Manufacturing Co.*, 70 N. L. R. B. 348, that a change in the duties and authority of foremen *because* they

[53] Bureau of Labor Statistics Bull. No. 745 (*supra*, p. 18, n. 10), p. 4.

joined a union is discrimination proscribed by Section 8 (3).

The Company attacks this holding on the ground that it constitutes an attempt by the Board "to dictate to management who its supervisors must be and what their powers, rights, and privileges must be" (Brief, p. 85). This interpretation of the Board's decision is, to say the least, unwarranted. The *Allis-Chalmers* case is simply an application of the self-evident and uniformly accepted principle that the worsening by an employer of the terms or conditions of employment of any employee because that employee has joined a labor organization discourages membership in the labor organization and *per se* constitutes illegal discrimination. Its effect, as applied to foremen, is no different from its effect as applied to rank-and-file employees. It means merely that the employer may not penalize employees for attempting to bargain collectively. A contrary holding would permit employers to achieve by indirection the exemption of employees from the benefits of the Act, the very result which the Company has thus far unsuccessfully sought.

Resolution of any difficulties which may arise from the unionization of foremen is, as we have said, a proper subject for collective bargaining. But the Company may not, in advance, act on the assumption that difficulties will prove insuperable through the normal processes of collective bar-

gaining. Such an assumption, destructive of the premises of the Act and of the statutory rights of the foremen, has been rejected by the courts in this as in other cases.[54]

4. Experience refutes the Company's fears as to the loyalty of its foremen

Experience has fully justified the conclusion of the Board and the courts that the inherent honesty of employees, coupled with the retention by the employer of power to discharge and discipline, wholly safeguards all legitimate employer interests. The history of the extension of collective bargaining rights to plant guards aptly demonstrates the point. As early as 1936, plant guards who had joined labor organizations sought the protection of the Act. Employers objected that such guards, who were often deputized as special police officers by local authorities, should not be deemed "employees" within the meaning of the Act.[55] The

[54] R. III, 2106; *National Labor Relations Board* v. *Armour & Co.*, 154 F. 2d 570, certiorari denied, October 14, 1946, No. 375, this Term.

[55] *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181 (August 21, 1936); *Matter of American-Hawaiian Steamship Co.*, 10 N. L. R. B. 1355 (January 21, 1939); *Matter of Aguilines, Inc.*, 12 N. L. R. B. 366 (April 20, 1939); *Matter of Federal Shipbuilding and Drydock Co.*, 19 N. L. R. B. 313 (January 11, 1940), 20 N. L. R. B. 270 (February 8, 1940); *Matter of Yellow Truck and Coach Co.*, 39 N. L. R. B. 14 (February 19, 1942); *Matter of General Motors Corp.*, 39 N. L. R. B. 1198 (March 25, 1942); *Matter of American Brass Co.*, 41 N. L. R. B. 783 (June 8, 1942); *Matter of Phelps Dodge Copper Products Corp.*, 41 N. L. R. B. 973 (June 15, 1942).

objection was uniformly predicated upon the assertion that if plant guards were permitted to join and be represented by labor organizations composed of rank and file employees over whom the guards exercised monitorial authority, the loyalty of the guards would be divided, their attention to duty (when fellow unionists were concerned) would become lax, and the employer could no longer rely upon the guards to perform their functions properly. This contention was elaborately pressed upon the Board in the very first plant guard case, *Matter of Luckenbach Steamship Co.*, 2 N. L. R. B. 181, 188–189 (August 31, 1936). But the evidence introduced in support disproved rather than proved it. As the Board pointed out "the only specific instance [of alleged inefficiency attributed to a plant guard's union affiliation] testified to was where a watchman who was a member of the Union had promptly reported to his employer * * * the longshoreman whom he detected pilfering." 2 N. L. R. B. at 188. The Board thereafter had occasion to observe the effect of collective bargaining by these guards upon the employer's legitimate interests in faithful performance. After the Board's certification of the union as bargaining representative for the plant guards, a majority of the employers involved in the *Luckenbach* case entered into a contract with the union covering both guards and the production employees. In a proceeding under Section 10 of

the Act, brought against those employers who had refused to honor the certification, the Board noted that although a year had elapsed since execution of the contract between the other employers and the Union, no attempt was made to show that "the operation of that agreement has not been satisfactory". *Matter of American Hawaiian Steamship Co.*, 10 N. L. R. B. 1355, 1362–1365 (January 21, 1939).

The bargaining pattern exemplified by the contract referred to in the *American-Hawaiian* case has since become commonplace in American industry. Neither managerial nor public interests have been adversely affected, and despite dire predictions that self-organization and collective bargaining by plant guards would result in undermining plant discipline and security, no such condition has eventuated. The reason is obvious. Labor organizations fully recognize the impropriety of making demands upon their members which are in any sense incompatible with the employees' loyal and faithful performance of duties to the employer. Thus collective agreements negotiated between representatives of plant guards and employers illustrate that management's fears that labor organizations will require employees to use their positions to further union interests rather than the interests of the employer are easily dispelled in the terms of the ultimate bargain. (Compare Chairman Herzog's

concurring opinion, R. I, 35–36.)[56] The Company admits that its own plant guards, whose organization several years ago it opposed on the same ground as it now opposes the unionization of its foremen,[57] have not become any less faithful or efficient (R. II, 1063–1065, 1205–1206). So, too, the Company's foremen had been members of the Association for 2½ years, when the hearing was held, surely long enough for any deficiency resulting from divided loyalty to have manifested itself. Yet the Company admitted that its foremen had not been disloyal or inefficient in the performance of their duties (R. II, 1044, 1065–1066, 1081–1084, 1212–1213).

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[56] We set forth in Appendix B, pp. 123–131, *infra*, clauses contained in collective agreements between representatives of plant guards and employers which deal with the special duties and responsibilities of plant guards. These contract clauses are collected in a pamphlet published by the American Iron & Steel Institute entitled, *Classified Provisions of Seventeen Collective Bargaining Agreements Covering Plant Protection Employees in Industrial Plants* (New York, Sept., 1944), pp. 177–181. Similar clauses dealing with the special functions and responsibilities of foremen can easily be drafted. The problems presented with respect to faithful performance by foremen of duties affecting rank and file employees do not differ significantly from the problems presented and met in this fashion with respect to faithful performance by plant guards. Indeed, the no-strike clauses necessary to protect management interests in the case of plant guards may not be equally necessary in the case of foremen. In any event, these are problems for collective bargaining.

[57] *Matter of Packard Motor Car Co.*, 47 N. L. R. B. 932. Cf. *Matter of Chrysler Corp.*, 44 N. L. R. B. 881.

The Company, therefore, errs in assuming that a foreman's union would make demands upon the foremen incompatible with their duty to the employer. It errs in assuming that if improper demands were made, the foremen would not resist them. It errs in assuming that if foremen succumbed to such hypothetical improper demands, the employer would be helpless to discipline them. It errs in assuming that representatives of foremen would make improper demands upon the employer, and that the employer would have to yield to those demands. Finally, it errs in assuming that if protection of collective-bargaining rights is denied the foremen, the situation which it envisages would automatically be corrected.

F. *The Company may not require its foremen to bargain individually rather than collectively*

The Company's objection stems basically from its misconception of the duty which employees generally owe to their employer. In bargaining with the employer for the establishment of his own working conditions, the employee cannot owe a duty of loyalty to the employer (R. III, 1811–1812; I, 32–33). Hence, it cannot be a breach of any duty for employees to decide that they prefer to face their employer collectively rather than to continue to accept his unilateral decisions as to their working conditions. This the Company fails to realize, since it takes the position, as stated by its Industrial Relations Manager, that

it is a breach of loyalty for *any* employee to strike to improve his working conditions (R. II, 998, 1081–1082), and that the only difference between a rank-and-file strike and a strike by supervisors is in the degree of "disloyalty" (R. II, 1084). The Company's argument that Congress did not intend foremen to engage in the "disloyal" act of striking necessarily assumes that Congress did intend to permit rank-and-file employees to indulge in such "disloyalty".

The dilemma can be avoided only by recognizing that Congress rejected entirely the idea that self-organization and strikes were inconsistent with the employees' duties to the employer. This is shown by the fact that the Company's arguments are indistinguishable from the arguments of those who challenged the premises and objectives of the Act prior to its adoption on the ground that unrestricted competition among employees is desirable and necessary, that self-organization for the purpose of collective bargaining tends to restrain such competition, and that such organization should therefore be banned.[58] Thus the Company argued in its brief before the Board in the representation case, p. 73, that "A foreman should operate as an individual. He is * * * in

[58] Webb, Sidney & Beatrice, *Industrial Democracy* (London, 1920), pp. 281–282; Twentieth Century Fund, *Labor and the Government* (New York, 1935), p. 57; Daugherty, Carroll R., *Labor Problems in American Industry* (Boston, 1936), pp. 543–544; Cummins, E. E., *The Labor Problem in the United States* (New York, 1935), p. 233.

competition with his other foremen—this competition is necessary if the standards of the product are to be maintained." And again (p. 81), "if [the foreman] feels that he cannot stand on his own feet and fight his way up the ladder—if he wishes to trade his opportunity to advance as an individual for the questionable security of collective bargaining, he can do so by remaining with or returning to the rank and file. Such a man would not be a good foreman."[59] Suffice it to say that these arguments, which are obviously as applicable to rank and file employees as to foremen, were presented to and were found wanting by Congress;[60] that the policies of the Act are posited on precisely the opposite premise; that the Board was not empowered by Congress to reappraise its judgment and decide among these conflicting economic theories anew; and that, while the Company may prefer to select as foremen only those who are averse to self-organization, just as many employers preferred, before the Act was passed, to hire employees who were willing to forego unionization, Congress may and has forbidden it to do so.

[59] That the last sentence may well have been written with tongue in cheek would appear from the Company's admission that its foremen who joined the Association and thereby demonstrated, on the Company's theory, that they wished "to trade [their] opportunity to advance as . . . individual[s] for the questionable security of collective bargaining," were, and have remained, good foremen. (R. II. 1044, 1065–1066, 1081–1084, 1212, 1213.)

[60] See note 45, p. 64, *supra*.

G. *The Court need decide only whether the Board's determination that foremen are "employees" has a "reasonable basis in law"*

The issue concerning the status of foremen as "employees" under the Act does not call for *de novo* decision by this Court. The Board, as the facts set forth in the Statement (*supra*, pp. 6–17) show, thoroughly considered all of the available evidence as it bore on the three controlling factors mentioned by this Court in the *Hearst* case, 322 U. S. 111, 129; namely, "the circumstances and background of employment relationship" in the industry involved (R. III, 1789–1802), "the abilities and needs of the [foremen] for self-organization and collective action" (R. III, 1802–1805); and "the adaptability of collective bargaining for the prompt settlement of [foremen's] disputes with their employers" (R. III, 1813–1814, I, 35–37). After extensive deliberation, it arrived at the conclusion, premised upon reasoning thoroughly articulated in its decisions,[61] that foremen must be deemed to be employees within the meaning of the Act. Referring to such a situation, this Court, in the *Hearst* case, said (322 U. S. at pp. 130–131) that:

> In making [the Board's] determinations as to the facts in these matters conclusive, if supported by evidence, Congress en-

[61] See *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793.

trusted to it primarily the decision whether the evidence establishes the material facts. Hence in reviewing the Board's ultimate conclusion, it is not the court's function to substitute its own inferences of fact for the Board's, when the latter have support in the record. *N. L. R. B.* v. *Nevada Copper Corp.*, 316 U. S. 105; cf. *Walker* v. *Altmeyer*, 2 Cir., 137 F. 2d 531. Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Assns.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the Commissioner's determination under the Longshoremen's & Harbor Workers' Act,[35] that a man is not a "member of a crew" (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251) or that he was injured "in the course of his employment" (*Parker* v. *Motor Boat Sales*, 314 U. S. 244) and the Federal Communications Commissioner's determination[36] that one com-

[35] 44 Stat. 1424, 33 U. S. C. § 901, *et seq.*

[36] Under § 2 (b) of the Communications Act of 1934, 48 Stat. 1064, 1065, 47 U. S. C. § 152 (b).

pany is under the "control" of another (*Rochester Telephone Corp.* v. *United States*, 307 U. S. 125), the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

We believe that the Board's determination in the instant case that the Company's foremen are "employees" within the meaning of Section 2 (3) of the Act is clearly within these controlling standards.

II

THE BOARD COULD PROPERLY FIND THAT THE FOREMEN CONSTITUTE AN APPROPRIATE UNIT FOR THE PURPOSES OF COLLECTIVE BARGAINING

Apart from its contention that foremen are not employees within the purview of Section 2 (3) of the Act, the Company contends further that the Board should deny to them the protection of Section 8 (5) of the Act, by holding that no matter how such foremen may be grouped for purposes of collective bargaining they cannot constitute "a unit appropriate for the purposes of collective bargaining" within the meaning of Section 9 (b) of the Act. This contention in substance is that although foremen are employees, and are as such protected by the Act against employer infringements upon their organizational rights through the tactics of interference, domination, and discrimination, they should nevertheless not be pro-

tected against infringements upon those rights accomplished by the refusal of employers to recognize and deal with their duly chosen representatives. The Company urges that the Board is empowered to achieve this result by virtue of the provision in Section 9 (b) which imposes upon the Board the duty of determining in each case whether a particular unit alleged to be appropriate will "insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act." This reference to the effectuation of the policies of the Act, the Company argues, authorizes the Board not merely to select among alternative units the one most likely to further the statutory objectives, but to disapprove every possible type of unit into which these employees may assemble and thereby prevent the establishment of the condition precedent to the employer's obligation to bargain under Section 8 (5).

In 1943, a majority of the Board, as then constituted, held for the first time in *Matter of Maryland Drydock Co.*, 49 N. L. R. B. 733, that it had the power which the Company attributes to it. There, and in several subsequent cases,[4] the Board exercised that power by denying certification to representatives of certain supervisory employees. In its decision in the representation proceeding

[4] *Matter of Boeing Aircraft Co.*, 51 N. L. R. B. 67; *Matter of Murray Corp. of America*, 51 N. L. R. B. 94; *Matter of General Motors Corp.*, 51 N. L. R. B. 457.

in the instant case, the Board, without reexamining the question of power, and assuming that it could hold respondent's foremen to be outside any appropriate unit, held that it would not, in the exercise of its discretion, thus deny certification to the Association (R. III, 1796–1798, 1809–1810, 1813–1814). In its subsequent decision in the complaint proceeding, it adhered to that view (R. I, 19–31), although the new member of the Board, Chairman Herzog, indicated his belief that the assumption on which the Board's decision was based was "open to question" (R. I, 34).

Shortly after its decision in the instant case, the Board, in *Matter of L. A. Young Spring and Wire Corp.*, 65 N. L. R. B. 298, took occasion to reexamine the entire statutory scheme, as well as the specific provisions upon which the Company relies. It there concluded that Section 9 of the Act was intended to be a vehicle not for denying but rather for promoting collective bargaining rights, and that it had no power to deny foremen those rights by excluding them from appropriate bargaining units.

We shall show that the Board's refusal to deny certification to the Association in the instant case was proper both on the theory that it lacked power to deny such certification and on the theory that, having such power, its refusal to exercise it was not an abuse of discretion.

A. The Board has no power to deny to foremen who are "employees" within the meaning of the Act statutory protection of the right to bargain collectively through freely chosen representatives by holding that they cannot constitute an appropriate bargaining unit

The terms of the Act do not admit of a construction which would empower the Board to suspend, with respect to any group of employees, the provisions of Section 8 (5) which requires employers to bargain collectively with freely chosen employee representatives. Yet that is just what the Company would have the Board do so far as its foremen are concerned.

Section 7 of the Act in terms confers upon all "employees" (as defined in Section 2 (3)) the rights "to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection." The Senate Report on the bill that became the Act makes it clear that the guarantee was so formulated for the purpose of "encouraging the practice of collective bargaining and protecting the rights upon which it is based." S. Rep. No. 573, 74th Cong., 1st Sess., p. 6. See also H. Rep. No. 1147, 74th Cong., 1st Sess., p. 8. In Section 8 (1) Congress accorded blanket protection of those rights against all forms of interference by employers. The re-

ports of the Congressional committees explain that the guarantees of Sections 7 and 8 (1) are not limited or restricted by the enumeration of unfair labor practices in other subsections of Section 8; those subsections merely "spell out with particularity some of the practices that have been most prevalent and most troublesome." S. Rep. No. 573, 74th Cong., 1st Sess., p. 9; H. Rep. No. 1147, 74th Cong., 1st Sess., p. 17; *Art Metals Construction Co.* v. *National Labor Relations Board*, 110 F. 2d 148, 150–151 (C. C. A. 2); *National Labor Relations Board* v. *Newark Morning Ledger Co.*, 120 F. 2d 262, 265, 266–267 (C. C. A. 3), certiorari denied, 314 U. S. 693. See National Labor Relations Board, *Sixth Annual Report* (1942), pp. 87–88. In particular, the Committees pointed out that Section 8 (5) was not a severable or independent part of the Act to be applied or withheld at will from employees who had been granted the right to self-organization and collective bargaining free from employer interference through the devices enumerated in the four preceding subsections of Section 8. Explaining the inclusion of Section 8 (5) in the Bill, the Senate Committee said (S. Rep. No. 573, 74th Cong., 1st Sess., p. 12):

> It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part

> of the other party to recognize such representatives as they have designated (whether as individuals or labor organizations) and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. * * * Experience has proved that neither obedience to law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. Such a course provokes constant strife, not peace.

And the House Committee noted, H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20, that "The fifth unfair labor practice, regarding the refusal to bargain collectively, rounds out the essential purpose of the bill to encourage collective bargaining and the making of agreements."

The Company's contention, therefore, that the Board is empowered to read Section 8 (5) out of the Act insofar as one class of employees is concerned and is thereby empowered, in the words of the Senate Committee to make of their statutory rights a "mere delusion," cannot, in the light of this clear evidence of Congressional intention, be supported. This is emphasized by the fact that when a majority of the Board, in *Maryland Drydock* case, departed from Board precedent, and in effect adopted the view the Company now urges, circumstances proved the validity of the Senate Committee's observation that "Such a course provokes constant strife, not peace."[65]

[65] See note 7, pp. 16–17, *supra*.

In the face of this legislative history as to the purpose of Section 8 (5), only the clearest language would justify interpreting Section 9 (b) in the manner urged by the Company. But the language of Section 9 (b), particularly when read in the light of the other provisions of the Act, dictates precisely the opposite view, and the reports of the Congressional Committees concerning the purposes of that Section confirm beyond doubt the propriety of the Board's present construction. Section 9 (b) provides:

> The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

This language, as the Board pointed out in the *L. A. Young* case, 65 N. L. R. B. 298, 303,[36] "is language not of exclusion but of classification. We are to choose between alternatives: Whether the appropriate unit for collective bargaining purposes shall be the 'employer unit, craft unit, plant unit, or subdivision thereof.' The function of deciding the appropriate unit is a positive one. 'It is not a negative concept to be used as a means of denying all bargaining rights under the Act to a given group

[36] Compare the concurring opinion of Chairman Herzog in the instant case (R. I, 33–35).

of employees in all circumstances.'[67] Once the Board determines that certain individuals are 'employees' within the meaning of the Act, its sole remaining duty under Section 9 (b) is to group these 'employees' in that unit which will insure to them the full benefit of their right to self-organization and to collective bargaining and otherwise effectuate the policies of the Act.' Under the power to define the unit, the Board may properly insist that foremen be organized in bargaining units apart from their subordinates, but it cannot ostracise them." The Board's view that

[67] The Board was here quoting from a decision of the New York State Labor Relations Board, *Matter of Bee Line, Inc.*, 6 N. Y. S. L. R. B. 686, 695, in which that Board discussed the phrasing of the State Act corresponding to Section 9 (b) (see R. I. 34). The New York Board's language appears in context as follows:

"The concept of appropriate unit is an affirmative one, intended to bring about the most desirable form of organization. It is not a negative concept to be used as a means of denying all bargaining rights under the Act to a given group of employees in all circumstances. Once it is determined that a group of persons are employees, they have a right under the Act and the Constitution of the State of New York to be placed in *some* appropriate unit—that one which will best facilitate their participation in the practice and procedure of collective bargaining."

The view adopted by the New York Board which has resulted in the certification of units of foremen and in the issuance of orders compelling employers to bargain collectively with representatives selected by a majority of the foremen in such units, has been approved by the New York courts. *New York State Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 183 N. Y. Misc. 1064, 52 N. Y. S. (2d) 590, affirmed, 269 App. Div. 934, 58 N. Y. S. (2d) 343, affirmed, 295 N. Y. 838, 66 N. E. 2d 853.

it is empowered under Section 9 (b) to determine only the composition of voting groups of employees, and not whether employees shall exercise the franchise, finds abundant support in the criteria which Congress established to guide the Board in making unit determinations. Section 9 (b) instructs the Board to decide the appropriateness of bargaining units in such fashion as "to insure to employees the full benefit of their right to self organization and to collective bargaining, and otherwise to effectuate the policies of this Act." These criteria are clearly not satisfied by unit determinations which deny rather than "insure * * * the full benefit of * * * collective bargaining," or which frustrate "the policies of this Act," by preventing rather than "encouraging the practice and procedure of collective bargaining," the policy stated in Section 1 of the Act.

So too, the Board's holding in *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B., No. 203, that Congress did not empower it to restrict the freedom of choice of any unit of employees where such selection would not frustrate the statutory rights of other employees, comports strictly with the statutory language. The Board had earlier held in *Matter of Godchaux Sugars, Inc.*, 44 N. L. R. B. 874, 877, that as respects foremen this result is required by Section 1 of the Act which states the Congressional policy to encourage "the exercise by workers of full freedom of association, self-organiza-

tion, and designation of representatives *of their own choosing.*" [Italics supplied.]

The Board's view that the statute does not authorize it to impose limitations upon the range of choice of representatives open to employees is clearly supported by the decision of this Court in *Hill* v. *Florida,* 325 U. S. 538. In that case, the Court had before it a state statute which purported to restrict the field of those who could act as collective bargaining representatives of employees. The statute was held invalid on the ground that it conflicted with the rights guaranteed employees under the National Labor Relations Act. In so holding, the Court emphasized that the purpose of the National Labor Relations Act is "to encourage collective bargaining and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice." And the Court explicitly stated at p. 541, that "Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon the agent's qualifications." In the face of the clear mandate of the statute, and this Court's unambiguous holding, the Board was properly constrained to hold that it was no more empowered than was the State of Florida to substitute its judgment for that of the employees as to who should represent them, and to conclude that it

would not be justified in "reaching out for powers to place limitations on the right of foremen, who are employees, to bargain collectively through representatives of *their own* choice" [italics in original]. Chief Justice Stone, dissenting on other grounds in *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 171–172, pointed out that, "the function assigned to the Board is not the choice of the labor organization to represent a bargaining unit, for that is to be the free choice of the majority of the employees in some defined group of employees which the Board finds to constitute the appropriate unit."

B. Assuming that the Board had power to exclude foremen from bargaining units, its refusal to do so here was not arbitrary

We have summarized above (pp. 17–22, 36–37, 56–60, 66–89) the Board's reasons for concluding that, assuming that it had the power to hold that foremen did not belong in any bargaining unit, it would not so hold here. In brief, the Board held that the widespread organization of foremen which in fact existed required the Board to make available the peaceful procedures of the Act for the establishment of collective bargaining relationships (R. III, 1802–1805, 1813–1814); that unless the Board did so, strikes by supervisory employees to achieve recognition would become more numerous (*ibid.*); that the Company was not correct in asserting that

foremen had no need for collective bargaining (R. III, 1812–1813); and that the Company's foremen would not perform their task with less efficiency or fidelity if allowed to bargain collectively (R. III, 1811–1812). These conclusions of the Board were reinforced in the instant case by the fact that, as the Board found (R. III, 1806–1808), the labor organization seeking to represent the supervisory employees here was not affiliated with any labor organization representing rank and file employees. We submit that none of these conclusions of the Board is open to successful challenge.

We have already discussed the Company's contention that collective bargaining by foremen would impair their faithful performance of duty; we have shown that the Company's misgivings as to the integrity of its foremen are not justified and that, in any case, denial of the right to bargain collectively would not protect the foremen from the influence which the company fears (*supra*, pp. 66–89). Just as there is no reason to believe that Congress excluded foremen altogether from the protection of the Act because of doubts as to their loyalty, there is no reason to conclude that the Board acted arbitrarily in refusing to achieve the same result by excluding foremen from appropriate bargaining units. These considerations, as we have shown (*supra*, pp. 66–89) are valid even where foremen propose to bargain through affiliated unions. While the Board's

discussion of this point in its decision in this case (R. III, 1811–1812) did not rest to any extent on the independence of the Association (Compare *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 386, 71 N. L. R. B., No. 203), the result here reached is nevertheless reinforced by the fact that it is independent of any labor organization representing rank and file employees. Similarly, our earlier discussion of the Board's findings that foremen have a legitimate interest in collective bargaining (*supra*, pp. 56–60), and that denial of the right to such bargaining can only lead to, rather than prevent, industrial strife (*supra*, pp. 17, 35–37, 59–60), is also fully applicable here.

Even if the Board had been given the power, in the exercise of its discretion under Section 9 (b), of the Act to hold that the Company's foremen lay outside of any appropriate bargaining unit, it cannot be said that it exercised that discretion unreasonably in refusing to hold that the foremen here lay outside the pale of the Act's orderly procedures. *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 135; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 113 F. 2d 698, 701 (C. C. A. 8), affirmed, 313 U. S. 146, 152. In determining bargaining units, the Board acts "to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of [the] Act" (Sec. 9 (b)). In addition, it is required in this, as in all of its

actions, to give weight to the general public interest for which it acts. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 362; *Amalgamated Utility Workers* v. *Consolidated Edison Co.*, 309 U. S. 261, 265; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 146 F. 2d 718, 721 (C. C. A. 6), certiorari granted, judgment vacated, and case remanded, 325 U. S. 838, decision on remand, 154 F. 2d, 932, certiorari granted, No. 418, this Term. The Board's decision clearly meets these tests. It advances the statutory policy of encouraging collective bargaining and puts a "premium on the conference table rather than on the harsh arbitrament of industrial war" (Chairman Herzog concurring in the instant case, R. I, 37). The Board analyzed in detail the Company's fears as to the effect of such a decision on the national economy as a whole (R. III, 1813–1814). It considered generally "the vital importance * * * to the Nation" of the issues raised (R. III, 1813). It concluded that to sustain the Company would be to invite industrial strife, "a state of affairs which the Nation can ill afford at this time and which the Act was designed to mitigate" (*ibid.*). Assuming the existence of power in the Board to make the exclusion urged by the Company, it cannot be said that in reaching the conclusion it did, the Board went beyond the limits of permissible discretion. To the contrary, actual experience has demonstrated that a reasonable exercise of dis-

cretion required the Board to reach that conclusion

III

THE BOARD PROPERLY FOUND THAT A SINGLE BARGAINING UNIT FOR THE FOUR GRADES OF FOREMEN WAS APPROPRIATE

The Board's finding that the appropriate unit within which the Company's supervisory employees may bargain collectively consists of all general foremen, foremen, assistant foremen, and special assignment men employed in the Company's Detroit plants likewise comports with the statutory standards provided by Congress for the Board's guidance. In holding that the four grades of foremen constitute a single appropriate unit, the Board relied upon the presence of factors which have traditionally been considered by the Board to justify grouping employees in a single unit. See, e. g., National Labor Relations Board, *Third Annual Report* (Gov't Print. Off. 1937), pp. 156–180. As the Court below pointed out (R. III, 2106):

> * * * The similarity of their obligations which compels them at times to act interchangeably, and of the privileges which set them all off from the workers of the rank and file, make them a group by themselves, necessarily experiencing the same needs, having in general the same conception of the relationship between them and their employer.

In addition is the equally important fact that all four grades of foremen have chosen to organize in a single organization, apart from rank and file workers on the one hand, and higher supervisory employees on the other. In considering this form and extent of organization by foremen, the Board also took cognizance of the fact that in modern industrial life, foremen of all varieties consider themselves as a single middle group between the rank and file and the policy making officials, (pp. 13–17, *supra*). The point is illustrated in the Constitution of the Foreman's Association (Article VI, Sections 2 and 3) which confines membership in that organization to employees who exercise supervisory powers but do not formulate managerial policy in negotiations with other employees (R. I, 88–89, III, 1346). Finally, it can hardly be doubted that the Board's finding comports with the statutory objective of equalizing the bargaining power of employees with that of employers and of according to employees the full benefit of their right to self-organization. The bargaining power of the foremen obviously will more nearly approximate that of their employer if all four grades of foremen bargain together than if each grade bargains separately.

The Company contended before the Board that the single fact that some grades of foremen exercise supervisory powers over foremen in other grades overcame the factors described above and required segregation of each grade of foremen

into a separate unit (R. III, 1819). The Board found, however, that this fact, standing alone, did not justify such a holding, particularly in view of the tenuous character of the authority exercised by one type of foreman over another, and the practical difficulties which would thereby be created (R. III, 1819–1820).

The Board has frequently found, both before and after its decision in the *Maryland Drydock* case, as it found here (R. III, 1819–1820), that a unit otherwise appropriate was not necessarily rendered inappropriate by the fact that certain of the employees in the unit exercised authority over other supervisory employees in the unit.[68] In the only case in which such a unit finding was

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[68] *Matter of International Mercantile Marine Co.*, 1 N. L. R. B. 384; *Matter of Lykes Bros. Steamship Co.*, 2 N. L. R. B. 102; *Matter of Black Diamond Steamship Corp.*, 2 N. L. R. B. 241; *Matter of Swayne & Hoyt, Ltd.*, 2 N. L. R. B. 282; *Matter of Grace Lines Inc.*, 2 N. L. R. B. 369; *Matter of Ocean Steamship Co.*, 2 N. L. R. B. 588; *Matter of New York & Cuba Mail Steamship Co.*, 2 N. L. R. B. 595; *Matter of Seas Shipping Co.*, 8 N. L. R. B. 422; *Matter of Standard Oil of New Jersey*, 8 N. L. R. B. 936; *Matter of New York & Cuba Mail Steamship Co.*, 9 N. L. R. B. 51; *Matter of Tidewater Associated Oil Co.*, 9 N. L. R. B. 823; *Matter of Cities Service Oil Co.*, 10 N. L. R. B. 954; *Matter of Aerovox Corp.*, 10 N. L. R. B. 652; *Matter of The Texas Co.*, 23 N. L. R. B. 1022; *Matter of A. H. Bull Steamship Co.*, 36 N. L. R. B. 99; *Matter of Carnegie Illinois Steel Corp.*, 37 N. L. R. B. 19; *Matter of Jones & Laughlin Steel Corp.*, 37 N. L. R. B. 366; *Matter of Dravo Corp.*, 39 N. L. R. B. 846; *Matter of Federal Mogul Corp.*, 66 N. L. R. B. 532; *Matter of Kelsey-Hayes Wheel Co.*, 66 N. L. R. B. 570; *Matter of Celotex Corp.*, 66 N. L. R. B. 744.

contested, the Board's order was sustained by the circuit court of appeals. *Jones & Laughlin Steel Corp. v. National Labor Relations Board,* 146 F. 2d 833 (C. C. A. 5), certiorari denied, 325 U. S. 886.[69] It is true that in the absence of other factors showing the appropriateness of such a grouping, the Board has excluded supervisors from units composed of rank and file employees.[70] That policy stems in part from the fact that the authority which supervisors exercise over rank and file employees normally lends coercive effect to their actions for or against organizational activities among subordinates and that for this reason what a supervisor "does or says towards helping or hindering in unionization is chargeable to the employer." *Jones & Laughlin Steel Corp.* v. *National Labor Relations Board,* 146 F. 2d 833, 834 (C. C. A. 5), certiorari denied, 325 U. S. 886. Equally important is the fact that there is little

[69] In *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.,* 128 F. 2d 130 (C. C. A. 3), the circuit court of appeals reversed a Board finding that a unit composed of captains and other licensed deck officers as well as unlicensed members of the crew was appropriate. The court's decision was not premised on the theory that the unit was inappropriate because it included supervisors of more than one level of authority, but was based solely on the ground that supervisory personnel should not be included in the same unit with rank and file employees. The decision, consequently, is of no direct relevance here.

[70] National Labor Relations Board, *Third Annual Report* (Gov't Print. Off., 1937) pp. 180–183; Daykin, Walter L., *Status of Supervisory Employees Under the Wagner Act,* 29 Iowa L. Rev. 297, 317–322.

community of interest between supervisors and rank and file employees; that the problems dealt with in collective bargaining by the two groups are distinct; that supervisors have organized apart from rank and file unions; and that rank and file employees normally do not desire to have supervisors in their bargaining units. Where these factors co-exist, the Board deems it advisable to maintain the separation of supervisors from non-supervisory employees insofar as self-organizational activities are concerned, and accomplishes this result by creating a separate bargaining unit for supervisory employees.[71] But the rationale of this policy itself indicates the basis for particular exceptions. Thus in industries like the printing trades, in which foremen have long joined together with rank and file employees for the purpose of collective bargaining, where representatives of rank and file employees are firmly established and have attained approximate equality of bargaining power with employers, the Board is of the opinion that the rank and file employees have comparatively little cause to fear reprisal if they act contrary to the supervisor's wishes unless the supervisors are acting, not in their own interests, but at the behest of,

[71] *Matter of People's Life Ins. Co.*, 46 N. L. R. B. 1115; *Matter of Swift & Co.*, 45 N. L. R. B. 209; *Matter of Southwestern Bell Tel. Co.*, 45 N. L. R. B. 1078; *Matter of Harmony Short Line*, 42 N. L. R. B. 757; *Matter of Union Collieries*, 41 N. L. R. B. 961; *Matter of Godchaux Sugars*, 44 N. L. R. B. 874; *Matter of Cramp Shipbuilding Co.*, 46 N. L. R. B. 115; *Matter of Murray Corp.*, 47 N. L. R. B. 1003.

or in the interests of, the employer. In such cases, the Board does not hold employers responsible for organizational activities of supervisors among rank and file personnel unless the employees have reasonable cause to believe that the employer has authorized or ratified the supervisors' activities.[72] Thus supervisors, in these instances, are placed on a parity with the rank and file whose organizational activities are likewise not binding upon employers unless authorized or ratified by them, and the Board recognizes their interest in unitary bargaining.[73] So too, the

[72] See *Matter of R. R. Donnelley & Sons Co.*, 60 N. L. R. B. 635, 638, note 4, enforced, 156 F. 2d 416 (C. C. A. 7), petition for a writ of certiorari filed, No. 790, this Term; *Matter of Jones & Laughlin Steel Corp.*, 66 N. L. R. B. 326, 71 N. L. R. B. 203.

[73] *Matter of Cullom & Ghertner*, 14 N. L. R. B. 270; *Matter of W. F. Hall Printing Co.*, 51 N. L. R. B. 640; *Matter of Country Life Press Corp.*, 51 N. L. R. B. 1362; *Matter of Union Bag & Paper Corp.*, 52 N. L. R. B. 591; *Matter of A. S. Abell Co.*, 54 N. L. R. B. 62; *Matter of Times-Mirror Co.*, 54 N. L. R. B. 787; *Matter of Service Printers, Inc.*, 54 N. L. R. B. 1082; *Matter of Proximity Mfg. Co.*, 54 N. L. R. B. 1179; *Matter of Cincinnati Daily Newspaper Publishers' Assn.*, 55 N. L. R. B. 571; *Matter of Leo Lichtenstein*, 55 N. L. R. B. 1429; *Matter of Rapinwax Paper Co.*, 56 N. L. R. B. 1774; Instances are not confined to the printing industry. See, e. g., *Matter of Campbell Machine Co.*, 3 N. L. R. B. 793; *Matter of Merrimack Mfg. Co.*, 9 N. L. R. B. 173; *Matter of Willys-Overland*, 9 N. L. R. B. 924; *Matter of Consumers' Power Co.*, 9 N. L. R. B. 742; *Matter of Richmond Hosiery Mills*, 8 N. L. R. B. 1073; *Matter of Jones Lumber Co.*, 3 N. L. R. B. 855; *Matter of J. C. Sanders Cotton Mill Co.*, 31 N. L. R. B. 298; *Matter of Harris Hub Bed & Spring Co.*, 13 N. L. R. B. 1236; *Matter of Coos Bay Lumber Co.*, 62 N. L. R. B. 93.

Board regards the relationship which exists between supervisors of various degrees of authority as decidedly different from that which normally exists between supervisors and rank and file employees. In the maritime and railroad industries the established patterns of self organization among supervisors include several levels of authority in single bargaining units,[74] and the Board has often found that masters, mates, and pilots, for example, on inland as well as on ocean going craft, may appropriately constitute a single unit.[75] As a corollary to such findings, the Board of course holds that all such classes of supervisors are free to participate in the organizational affairs of the employees in the unit, and that their conduct in this respect is not attributable to the employer unless authorized or ratified by him.[76]

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[74] Twentieth Century Fund, *How Collective Bargaining Works* (New York, 1942), pp. 938, 960, 963; Maritime Labor Board; *Report to the President and the Congress* (March 1, 1940), p. 106; Hoagland, H. E., *Wage Bargaining on the Vessels of the Great Lakes*, University of Illinois Studies in the Social Sciences, Vol. VI, No. 3 (Urbana, 1917); United States Department of Labor Bull. No. 745; *Union Membership and Collective Bargaining by Foremen*, pp. 6, 9; National Mediation Board, *Tenth Annual Report* (Gov't Print. Off., 1945), pp. 76–78.

[75] Cases cited note 68, p. 108, *supra*.

[76] See, e. g., *Matter of B. F. Goodrich Co.*, 64 N. L. R. B. 1303; *Matter of R. R. Donnelley & Sons Co.*, 60 N. L. R. B. 635, enforced 156 F. 2d 416 (C. C. A. 7), petition for a writ of certiorari filed, No. 790, this Term; *Matter of Jones & Laughlin Steel Co.*, 66 N. L. R. B. 386, 71 N. L. R. B., No. 203; cf. *Matter of Tennessee Copper Co.*, 5 N. L. R. B. 117, 119.

The decision in the instant case follows the pattern established by these earlier holdings.[77] Certainly it cannot be said in view of the Board's careful consideration of all of the factors bearing upon the question and its reasoned statement concerning the balancing of those factors which led it to decide as it did, that its conclusion is "impractical or unwise, and much less that it is unlawful" (*Jones & Laughlin Steel Corp.* v. *National Labor Relations Board,* 146 F. 2d 833, 835 (C. C. A. 5), certiorari denied, 325 U. S. 886), or lacking in *"rational basis." National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 135; *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board,* 313 U. S. 146; *May Department Stores* v. *National Labor Relations Board,* 326 U. S. 376; *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. 2d 586–587 (C. C. A. 2), certiorari denied, 313 U. S. 594; *National Labor Relations Board* v. *Clarksburg Publishing Co.,* 120 F. 2d 976, 980 (C. C. A. 4); *National Labor Relations Board* v. *Chicago Apparatus Co.,* 116 F. 2d 753, 755 (C. C. A. 7); *National Labor Relations Board* v. *Lund,* 103 F. 2d 815, 819 (C. C. A. 8); *International Ass'n of Machinists* v. *National Labor Relations Board,*

[77] The cases cited in its decision (R. III, 1820, n. 31), which the Board here overruled, of course, marked a departure from the pattern outlined above.

110 F. 2d 29, 34–35 (App. D. C.), affirmed, 311 U. S. 72.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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JANUARY 1947.

APPENDIX A

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151, *et seq.*) are as follows:

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions,

by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

* * * * *

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as

amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

* * * * *

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to Section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under Section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to Section 10 (c) is based

in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this Section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the

question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if

application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

APPENDIX B

PROVISIONS OF COLLECTIVE BARGAINING AGREEMENTS RELATING TO THE DUTIES AND RESPONSIBILITIES OF PLANT PROTECTION EMPLOYEES

American Steel and Wire Company of New Jersey and United Steelworkers of America (C. I. O.); Agreement Dated October 1, 1943

The Union recognizes that it is the responsibility of the Plant Protection employes to familiarize themselves with the shop rules, including safety regulations established by the Company and other regulations established by governmental agencies, and to report all violations thereof. The Union agrees that the Plant Protection employes shall discharge their duties, as assigned to them impartially and without regard to any union or nonunion affiliation of any employe of the Company, and that failure to do so constitutes sufficient cause for discipline up to and including dismissal, and for reporting such cases to the proper military authorities.

The Union recognizes that it is the responsibility of the Plant Protection employes to guard and protect the employes and their property while on plant property; the plants, premises, material, facilities, and property of the Company at all times and under all circumstances.

The Union agrees that its members shall faithfully discharge this responsibility, and during the life of this Agreement, that it will not cause, or

permit its members to cause, nor will any member of the Union take part in any strike, sit-down, stay-in, stoppage of work or other interference with or refusal to perform their duties regularly assigned to them. The Union further agrees, in the event of any controversy between the Company and any other group or organization of its employes, resulting or threatening to result in any strike, stoppage of work or other interference with production, that its members will continue to report for duty, remain at their posts, and in the regular manner, discharge the duties assigned to them. The Company reserves the right to cancel this Agreement in the event of any violation of this section and to discipline any employes who engage in such violations.

Aviation Corporation and Amalgamated Plant Protection Local Union, No. 114 Affiliated With the International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, Agreement Dated August 26, 1943

It is realized by the parties hereto that the adequate and continuous protection of the Company's Plant, premises and products, is of paramount importance, and each party agrees that there shall be no interference whatsoever in the maintenance of satisfactory plant protection so long as required by the Company, and Plant Protection Employes covered by this agreement shall continue to perform their duties irrespective of a strike of other Unions, other Locals of this Union or other Locals of the CIO or other Unions, or employes at the Company's Plant.

When necessary to instruct Plant Protection Employees as to their duties in connection with suspected plant sabotage or thievery or other unlawful or irregular acts and such instructions are deemed confidential by the Company or any Public Officer, such instructions and information shall be so delivered to Plant Protection Employees, and shall not be disclosed by them to the Union, Union Officers, or others. Any such necessary instructions shall be given directly to each individual guard by the chief of guards or other representatives of the Plant Management. Any Plant Protection Employee violating this rule will be subject to discipline up to and including dismissal.

Should any difference arise between the Company and the Union as to the meaning or application of the provisions of this Agreement as to hours of work, rates of pay, or conditions of employment, or should any trouble or controversy of any kind arise in, or with respect to the plant as between the Company and the Union, there shall not on account or by reason of such difference, controversy, or trouble, be any strike, suspension, or slow-up of work at the Plant, either prior to or during efforts to settle such differences, controversies, or trouble, or after the settlement thereof but all such differences, controversies, or troubles shall be settled with utmost dispatch, and only in the manner set forth under Grievance Procedure.

Bethlehem Steel Company and Guards Local Union No. 23332 and American Federation of Labor, Agreement Dated December 13, 1943

The Union recognizes and agrees that the Employees covered by this Agreement have a special,

confidential, and direct responsibility to the Company requiring:

(a) That such Employees completely and diligently devote themselves to the interests of the Company.

(b) That such Employees familiarize themselves with and comply with all police, property protection, and safety rules, regulations, and orders relating to the Plant and all directions and instructions of the Management of the Company relating to the Plant.

(c) That such Employees enforce said rules, regulations, orders, directions, and instruction and faithfully report to the Management of the Company all infringements or violations thereof and all other information as to activities detrimental to the Company, its plants, or its employees.

(d) That such Employees keep confidential and do not divulge to any person other than the Management of the Company (or the United States Army if so required during the war emergency) all information obtained from any source having any bearing upon the Plant, its operations, or personnel.

(e) That such Employees fulfill and discharge their duties diligently, conscientiously, and impartially and without regard to any union or non-union affiliation of any employee or employees of the Company or any other person or persons, and shall not engage in union activity on the property of the Company or on Company time.

(f) That such Employees conduct themselves at all times, both on and off duty, in accordance with the confidence and trust reposed in them.

(g) That such Employees at no time engage in any strike, mass-quit, work-stoppage, slow-down, sit-down, picketing, or any other conduct which may, in any way, interrupt or interfere with production at the Plant and that they will at all times fulfill and discharge their duties without regard to any strike, mass-quit, work-stoppage, slow-down, sit-down, picketing, or any other interruption of or interference with production at the Plant.

The Union agrees that failure on the part of any Employee or Employees to observe and fulfill such responsibilities shall be just cause for discipline by the Company up to and including summary dismissal.

Brewster Aeronautical Corporation and Local No. 365, U. A. W.–C. I. O. and the International Union U. A. W.–C. I. O., Agreement Dated April 1944

(a) The Union recognizes that the employees covered by this agreement are in direct charge of the lives and safety of a large number of workers in the plants of the Corporation and of the property of the United States. For this reason they have been organized into a semimilitary organization, which must of necessity be subjected to strict discipline. The Union agrees that there shall be no interference with the exercise of such discipline, and further that employees covered hereby shall not engage, or participate, in any strike or other stoppage of work. The Company shall not cause or sanction a lock-out.

(b) Guards employed under the terms of this agreement will be permitted to go through picket

lines, whenever, and wherever they shall be established, for the purpose of protecting lives and property, but in no case shall guards so working be permitted to do work normally performed by others or work other than that which is required in the performance of their normal duties.

(c) It is understood and agreed that the Union will not in any way interfere with the exercise by the guards of their full police powers in preserving order and protecting property, provided, however, that the guards covered by this agreement shall never be used as strike breakers or labor spies.

Columbia Steel Company and United Steelworkers of America (Local No. 1577), Agreement Dated August 21, 1943

The Union recognizes that it is the responsibility of the Plant Protection employes to familiarize themselves with the shop rules established by the Company and to faithfully report all violations thereof. The Union agrees that the Plant Protection employes shall discharge their duties, as assigned to them impartially and without regard to any union or nonunion affiliation of any employe of the Company, and that failure to do so constitutes sufficient cause for discipline up to and including dismissal, and for reporting such cases to the proper representatives of the War Department.

The Union recognizes that it is the responsibility of the Plant Protection employes to guard and protect the employes and their property while

on plant property; the plants, premises, material, facilities, and property of the Company at all times and to enforce the Company's rules. The Union agrees that its members shall faithfully discharge this responsibility, and, during the life of this Agreement that it will not cause, or permit its members to cause nor will any member of the Union take part in any strike, sit-down, stay-in, stoppage of work or other interference with or refusal to perform their duties regularly assigned to them. The Union further agrees, in the event of any controversy between the Company and any other group or organization of its employees, resulting or threatening to result in any strike, stoppage of work or other interference with production, that its members will continue to report for duty, remain at their posts, and in the regular manner, discharge the duties assigned to them. The Company reserves the right to discipline including discharge in accordance with Section 9 any employes who violate any provisions of this Section.

Tennessee Coal, Iron and Railroad Co. and United Steelworkers of America on Behalf of Local Union No. 2927, Agreement Dated June 9, 1943

The Union recognizes that it is the responsibility of the Plant Protection employees to familiarize themselves with the Plant Conduct Rules established by the Company, and to faithfully report all violations thereof. The Union agrees that the Plant Protection employees shall discharge their duties, as assigned to them impar-

tially and without regard to any union or non-union affiliation of any employee of the Company, and failure to do so constitutes sufficient cause for discipline up to and including dismissal, and for reporting such cases to the proper representatives of the United States Army.

The Union recognizes that it is the responsibility of the Plant Protection employees to guard and protect the employees and their property while on plant property, the plants, premises, material, facilities, and property of the Company at all times and under all circumstances. The Union agrees that its members shall faithfully discharge this responsibility, and, during the life of this Agreement, that it will not cause, or permit its members to cause, nor will any member of the Union take part in any strike, sit-down, stay-in, stoppage of work or other interference with or refusal to perform their duties regularly assigned to them. The Union further agrees, in the event of any controversy between the Company and any other group or organization of its employees, resulting or threatening to result in any strike, stoppage of work or other interference with production, that its members will continue to report for duty, remain at their posts, and in the regular manner, discharge the duties assigned to them. The Company reserves the right to cancel this Agreement in the event of any violation of this Section and discipline any employees who engage in such violation.

United States Rubber Co. and United Rubber Workers of America, Local Union No. 101, Agreement Dated February 3, 1943

It is realized by the parties hereto that the adequate and continuous protection of the Company's Plant, premises and products is of paramount importance and each party agrees that there shall be no interference whatsoever in the maintenance of satisfactory plant protection so long as required by the Company, and Plant Protection Employees covered by this agreement shall continue to perform their duties irrespective of a strike by other unions or employees at the Company's Plant, or for any other reason.

When necessary to instruct Plant Protection Employees as to their duties in connection with suspected plant sabotage or thievery and such instructions are deemed confidential by the Company or any public officer, such instructions and information shall be so delivered to Plant Protection Employees and shall not be given to the Union members or Officers or others. Any such necessary instructions shall be given directly to each individual guard by a direct representative of the Management. Any Plant Protection Employees violating this rule will be subject to discharge.

Any Plant Protection Employees who drink any alcoholic beverage on the Company's premises shall be subject to discharge, or report for work under the influence thereof shall be subject to disciplinary action by the Company.

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